TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 32.

CHARLES H. NUTTING, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

FILED FEBRUARY 26, 1900.

(17,655.)

(17,655.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 541.

CHARLES H. NUTTING, PLAINTIFF IN ERROR,

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THE COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 6, 1900.

1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the honorable the judges of the superior court of the Commonwealth of Massachusetts, holden at Boston, within and for the county of Suffolk, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said superior court, before you or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between The Commonwealth of Massachusetts, plaintiff, and Charles H. Nutting, defendant, in a plea of not guilty, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Charles H. Nutting, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the tenth day of March next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the seventeenth day of February, in the year of our Lord one thousand nine hundred.

ALEX. H. TROWBRIDGE,
Clerk of the Circuit Court of the United States, District of Massachusetts.

Allowed by—
ALBERT MASON,
Chief Justice Superior Court.

2 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

And now, here, the judges of the superior court of said Commonwealth make return of this writ by annexing hereto and sending herewith, under the seal of the said superior court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, John P. Manning, clerk of said superior court for the transaction of criminal business within and for said county, have hereto set my hand and the seal of said court this nineteenth day of February, A. D. 1900.

Seal of the Superior Court.

JOHN P. MANNING, *Clerk.*

3 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

To all persons to whom these presents shall come, Greeting:

Know ye that among the records of our superior court for the transaction of criminal business within and for the county of Suffolk, begun and holden at Boston on the first Monday of January, A. D. 1900, it is thus contained, the following being the entire record in the case of The Commonwealth *versus* Charles H. Nutting.

The following being the indictment found against said Nutting by the grand jurors on the eleventh day of March, A. D. 1899:

4 *Indictment.*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *To wit:*

At the superior court begun and holden at the city of Boston, within and for the county of Suffolk, for the transaction of criminal business, on the first Monday of March, in the year of our Lord one thousand eight hundred and ninety-nine, the jurors for the Commonwealth of Massachusetts on their oath present that Charles H. Nutting, of Boston aforesaid, on the eighteenth day of November, in the year of our Lord one thousand eight hundred and ninety-eight, at Boston aforesaid, did act in the negotiation and transaction of unlawful insurance with a foreign insurance company not admitted to do business in said Commonwealth by then and there for one William McKie, of said Boston, negotiating with and procuring to be issued by divers certain individuals as insurers a certain contract and policy of insurance against loss upon a certain vessel of said McKie there situate, the said individuals then being associated, organized, and engaged as principals in the business of insurance under and by authority of the government of the United Kingdom of Great Britain and Ireland, and said individuals not being then and there admitted to do insurance business in said Commonwealth

according to law, against the peace of said Commonwealth and contrary to the form of the statute in such case made and provided.

A true bill.

JAMES N. THOMPSON,
Foreman of the Grand Jury.

M. J. SUGHRUE,
1st Ass't District Attorney.

March 11, 1899.—Returned into said superior court by the grand jurors and ordered to be filed.

[Seal of the Superior Court.]

Attest: JOHN P. MANNING, *Clerk.*

5 On the fourteenth day of said March said Nutting came into said court and was set at the bar, and, having said indictment read to him, he said thereof that he was not guilty.

Thereupon the court ordered that said Nutting recognize to said Commonwealth, with sufficient sureties in the sum of one hundred dollars, for his appearance before said court from day to day and sitting to sitting to answer further to said indictment, and abide the final decree and order of said court thereon, and not depart without leave, and said Nutting recognized personally in said sum and deposited said sum with the clerk of said court in lieu of said sureties.

On the twenty-fourth day of April, A. D. 1899, the said Nutting was set at the bar, and for trial put himself upon the country, and the Commonwealth did the like by its attorney, John D. McLaughlin, Esquire.

A jury was empanelled and sworn to try the issue, to wit, Caleb B. Buckman, foreman, and eleven of his fellows, who, after hearing and understanding all matters and things concerning the same, returned their verdict, and on oath said that said Nutting was guilty.

On the eighth day of May, A. D. 1899, the said Nutting, by his attorney, filed exceptions to the rulings of the court, time having been extended for the filing of the same.

On the fourteenth day of June, A. D. 1899, the exceptions aforesaid being examined and found conformable to the truth were allowed, and were ordered to be transmitted to the supreme judicial court of said Commonwealth, and said indictment was ordered to be continued to await the determination of the justices of said court, and said exceptions are as follows:

6 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

Superior Court for the Transaction of Criminal Business, April Sitting, A. D. 1899.

COMMONWEALTH
vs.
CHARLES H. NUTTING.

Defendant's Exceptions.

This was an indictment under chapter 522 of the Acts of 1894, for negotiating and transacting unlawful insurance with a foreign insurance company not admitted to do business in the Commonwealth of Massachusetts.

A copy of the indictment is hereto annexed and marked "A."

All the evidence in the case was submitted to the jury upon an agreed statement of facts in writing, a copy of which is hereto annexed and marked "B."

At the close of the evidence the defendant's counsel requested the court to make certain separate rulings, a copy of which *are* hereto annexed and marked "C."

The court refused to make any or all of said rulings, and the defendant duly excepted to such refusals. The court thereupon instructed the jury that upon the evidence set out in said agreed statement of facts, they would be warranted in finding the defendant guilty, and the defendant duly excepted thereto.

The jury thereupon returned a verdict of guilty, and the defendant, being aggrieved by the foregoing refusals to rule as requested and by the foregoing ruling, prays that his exceptions may be allowed.

By his attorneys, CARVER & BLODGETT.

June 14, 1899.—Exceptions allowed.
CALEB BLODGETT,
Justice of the Superior Court.

7 "A."

Indictment.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *To wit:*

At the superior court, begun and holden at the city of Boston, within and for the county of Suffolk, for the transaction of criminal business, on the first Monday of March in the year of our Lord one thousand eight hundred and ninety-nine.

The jurors for the Commonwealth of Massachusetts on their oath present, that Charles H. Nutting, of Boston aforesaid, on the eighteenth day of November in the year of our Lord one thousand eight hundred and ninety-eight at Boston, aforesaid, did act in the

negotiation and transaction of unlawful insurance with a foreign insurance company not admitted to do business in said Commonwealth, by then and there, for one William McKie of said Boston, negotiating with, and procuring to be issued by, divers certain individuals as insurers, a certain contract and policy of insurance against loss upon a certain vessel of said McKie there situate, the said individuals then being associated, organized, and engaged as principals in the business of insurance, under and by authority of the Government of the United Kingdom of Great Britain and Ireland, and said individuals not being then and there admitted to do insurance business in said Commonwealth according to law.

Against the peace of said Commonwealth and contrary to the form of the statute in such case made and provided.

A true bill.

JAMES N. THOMPSON,
Foreman of the Grand Jury.

M. J. SUGHRUE,
First Assistant District Attorney.

"B."

Agreed Statement of Facts.

It is agreed that some time prior to the eighteenth day of November, 1898, Charles H. Nutting, of Boston, solicited from one William McKie, a ship-builder in Boston, the business of procuring insurance upon a vessel then in process of construction by said McKie in said McKie's ship yard in said Boston. That said Nutting was at said time a licensed insurance broker in said Boston and was at said time attorney and agent of Johnson & Higgins, average adjusters and insurance brokers, having an office in said Boston at 12 Central street in charge of defendant and another and having a principal office in New York city, New York.

That some time after said McKie was so solicited by defendant for said business as aforesaid, said Nutting, acting as agent for said Johnson & Higgins, secured the authority of said McKie to the placing of a contract of insurance for £4,124 upon said vessel. That thereupon said Nutting transmitted an order for said insurance to said Johnson & Higgins, of New York and that said Johnson & Higgins at once wrote to John D. Tyson & Company, of Liverpool, England, said John D. Tyson & Company being the Liverpool agents of said Johnson & Higgins, to procure insurance upon the said vessel of said McKie for the amount of £4,124 as aforesaid. That thereupon said John D. Tyson & Company, pursuant to said request to procure a policy of marine insurance, did procure a policy (a copy of which is hereto attached marked "D") to be issued and delivered at Liverpool by the London Lloyds to said John D. Tyson & Company in favor of said Johnson & Higgins and "on account of whom it may concern, as well in their own name as for and in the name and names of all and every other person or persons to whom the same doth, may or shall appertain." Said

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John D. Tyson & Company at the time of receiving said policy advancing and paying the premiums thereon for account of Johnson & Higgins, said John D. Tyson & Company receiving a commission upon said insurance from said Lloyds for and on account of themselves and of said Johnson & Higgins. That at all the times herein mentioned said London Lloyds were individual insurers, citizens of England associated and engaged as principals in the business of insurance under and by authority of the Government of the United Kingdom of Great Brittain and Ireland and carrying on said business in England upon the Lloyds' plan, whereby each associate underwriter becomes liable for a proportionate part of the whole amount insured by a policy. That said John D. Tyson & Company, having received said policy from the said London Lloyds, sent said policy to said Johnson & Higgins of New York, and said Johnson & Higgins in New York having made the endorsement which appears on the back of said policy at the request of said McKie sent said policy by mail to defendant who, thereupon, at Boston, Massachusetts, on the said eighteenth day of November, 1898, sent the same by mail to said McKie. Said London Lloyds not having complied with any of the requirements imposed by the laws of Massachusetts and not being admitted to do insurance business in this Commonwealth according to law.

That said policy was procured for said McKie from said London Lloyds as aforesaid for compensation in the usual course of the business of said Johnson & Higgins and said John D. Tyson & Company and said defendant. That said Charles H. Nutting and said William McKie were at all times mentioned in said indictment, and in this statement, citizens of the Commonwealth of Massachusetts.

That neither said John D. Tyson & Company, nor said Johnson & Higgins, nor said Charles H. Nutting were agents for said London Lloyds except so far as the facts herein stated constitute them such agents, and the term "broker" is not to be interpreted as meaning that they were such agents except so far as the facts herein stated constitute them such agents.

9

For the Commonwealth,

M. J. SUGHRUE,
First Assistant District Attorney.
CARVER & BLODGETT,
Attorneys for Defendant.

"C."

Defendant's Request for Rulings.

First. That on all the evidence in the case, the court should direct the jury to return a verdict of not guilty.

Second. That on all the evidence in the case the jury would not be warranted in finding a verdict of guilty.

Third. That on all the evidence in the case, no unlawful act has been committed by the defendant.

Fourth. That the contract of insurance set forth in the evidence was made entirely outside the Commonwealth of Massachusetts.

Fifth. That the defendant cannot be held criminally liable for an act done without the State; and the last clause of section 3 of chapter 522 of the Acts of 1894 of this Commonwealth, providing that all contracts of insurance on property, lives or interests in this Commonwealth shall be deemed to be made therein, cannot make a contract entered into without the Commonwealth of Massachusetts an act done within the Commonwealth for the purposes of criminal liability, and is null and void in so far as it purports so to do.

Sixth. That so much of section 3 of chapter 522 of the Acts of 1894 of the Commonwealth of Massachusetts as provides that all contracts of insurance on property, lives or interests in this Commonwealth shall be deemed to be made therein, and as attempts to make a contract entered into without the Commonwealth of Massachusetts an act done within the Commonwealth, is contrary to the provisions of the Constitution of the United States, and is unconstitutional and void.

Seventh. That so much of section 87 of chapter 522 of the Acts of 1894 of the Commonwealth of Massachusetts as purports to make illegal such acts as were done by the defendant in this case, is contrary to the provisions of the Constitution of the United States and is unconstitutional and void.

Eighth. That so much of section 98 of chapter 522 of the Acts of 1894 of the Commonwealth of Massachusetts as purports to make illegal such acts as were done by the defendant in this case, is contrary to the provisions of the Constitution of the United States, and is unconstitutional and void.

Ninth. That the defendant acted merely as the agent of the assured in obtaining the contract of insurance set forth in this case.

Tenth. That the defendant in no way represented the London Lloyds (the insurers) in relation to the contract of insurance set forth in this case.

Eleventh. That so much of chapter 522 of the Acts of 1894 of the Commonwealth of Massachusetts as purports to make illegal such acts as were done by the defendant in this case, is contrary to the provisions of the fourteenth amendment of the Constitution of the United States and is unconstitutional and void.

By his attorneys, CARVER & BLODGETT.

"D."

A.

Insurance Policy.

This policy is issued in the form printed and supplied by the government previous to 1st August, 1887, except that the free-of-capture clause has been inserted.

SEAL.

STAMP.

Any person not an underwriting member of Lloyd's subscribing this policy or any person uttering the same if so subscribed, will be liable to be proceeded against under sec. 31, of Lloyd's act.

S. G.

£4,124.

Printed at Lloyd's Royal exchange.

(No. —.)

Be it known that Johnson & Higgins, on a/c of whom it may concern, as well in their own name, as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all, doth make assurance and cause themselves and them and every of them to be insured, lost or not lost, at and from say for and during the space of twelve calendar months commencing at noon 16th November 1898, and ending at noon 16th November 1899. Beginning and ending with Greenwich mean time. In port at Boston except during trial trips in accordance with the terms of the printed slip attached hereto, upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat and other furniture, of and in the good ship or vessel called the No. 3 ferry-boat whereof —— —— is master, under God, for this present voyage, or whosoever else shall go for master in the said ship, or by whatsoever other name or names the same ship, or the master thereof, is or shall be named or called, beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship as above upon the said ship, &c. STAMP.

And shall so continue and endure, during her abode there, upon the said ship, &c.; and further, until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandises whatsoever, shall be arrived at as above upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety, and upon the goods and merchandises until the same be there discharged and safely landed; and it shall be lawful for the said ship, &c., in this voyage to proceed and sail to and touch and stay at any ports or places whatsoever without prejudice to this insurance. The said ship, &c., goods and merchandises, &c., for so much as concerns the assured by agreement between the assured and assurers in this policy, are and shall be valued at

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£4,124: On hull, tackle, apparel & furniture } Valued as per special
machinery & boilers. } clause attached.

Including materials for construction in yards, shops and docks.

Touching the adventures and perils which we the assurers are contented to bear and do take upon us in this voyage, they are, of

the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises and ship, &c., or any part thereof; and in case of any loss or misfortune, it shall be lawful to the assured, their factors, servants, and assigns, to sue, labour, and travel for, in and about the defence, safeguard and recovery of the said goods and merchandises and ship, &c., or any part thereof, without prejudice to this insurance; to the charges whereof we, the assurers, will contribute, each one according to the rate and quantity of his sum herein assured. And it is especially declared and agreed that no acts of the insurer or insured in recovering, saving, or preserving the property insured, shall be considered as a waiver or acceptance of abandonment. And it is agreed by us, the insurers, that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard street, or in the Royal exchange, or elsewhere in London.

Warranted, nevertheless, free of capture, seizure and detention, and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war.

And so we the assurers are contented, and do hereby promise and bind ourselves, each one for his own part, our heirs, executors, and goods, to the assured, their executors, administrators, and assigns, for the true performance of the premises, confessing ourselves paid the consideration due unto us for this assurance by the assured at and after the rate of ten shillings per cent.

In witness whereof, we the assurers have subscribed our names and sums assured in London, 18th November, 1898.

N. B.—Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded; sugar, tobacco, hemp, flax, hides and skins are warranted free from average under five pounds per cent.; and all other goods, also the
12 ship and freight, are warranted free from average under three pounds per cent., unless general, or the ship be stranded.

(In the event of accident whereby loss or damage may result in a claim under this policy the settlement will be much facilitated if immediate notice be given to the nearest Lloyds' agent.)

Subject to the printed clauses attached.

This insurance is to cover also vessel's machinery & boilers in the yard of E. Hodge & Co. and Lockwood's yard at east Boston.

Should a claim arise under this policy it is hereby declared and agreed that the value of said vessel (including hull, tackle, apparel, furniture, machinery and boilers), shall be taken at the aggregate amount that may be insured on said vessel at the time of the accident occur-ing.

Builders' Risks.

Attached to policy per No. 3: Ferry-boat for £4,124: Dated 18th Nov., '98:

This insurance is also to cover all risks of fire, including materials in yards, shops and docks, and all risks of launching and breakage of the ways, and whilst fitting out.

This insurance is also to cover all risks of trial trips as often as required, and all risks whilst proceeding to and returning from the trial course.

With leave to proceed to and from any wet or dry docks, harbours, ways, cradles and pontoons during the currency of this policy.

In case of failure of launch, underwriters to bear all subsequent expenses incurred in completing launch.

Average payable irrespective of percentage, and without deduction of one-third, whether the average be particular or general.

General average and salvage charges as per foreign custom, payable as per foreign statement, and / or per York-Antwerp rules if required; and in the event of salvage, towage, or other assistance being rendered to the vessel hereby insured by any vessel belonging in part or in whole to the same owners, it is hereby agreed that the value of such services (without regard to the common ownership of the vessels) shall be ascertained by arbitration in the manner hereinafter provided for under "collision clause," and the amount so awarded, so far as applicable to the interest hereby insured shall constitute a charge under this policy.

In event of deviation to be held covered at an additional premium to be hereafter arranged.

To cover also while building all damage to hull, machinery, apparel, or furniture caused by settling of the stocks, or failure or breakage of shores, blocking or staging, or of hoisting or other gear, either before or after launching and while fitting out.

With leave to increase value.

To return 6d. per cent. net for every 30 days of unexpired time, if this policy is cancelled and arrival.

Should the above vessel be at sea on the expiration of this policy, it is agreed to hold her covered till arrival at port of destination (provided that before the expiration the assured shall have given notice of intention to so continue) at a *pro rata* monthly premium.

It is also agreed that any changes of interest in the steamer hereby insured shall not affect the validity of this policy.

And it is expressly declared and agreed that no acts of the insurer or insured, in recovering, saving or preserving the property insured shall be considered as a waiver or acceptance of abandonment.

This insurance also specially to cover loss of or damage to the hull or machinery, through negligence of master, mariners, engineers, or pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull,

or from explosions, riots, or other causes of whatever nature arising either on shore or otherwise, howsoever, causing loss of or injury to the property hereby insured, provided such loss or damage has not resulted from want of due diligence by the owners of the ship, or any of them, or by the manager, and to cover all risks incidental to steam navigation, or in graving docks.

Collision Clause.

And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof become liable to pay, and shall pay, by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the ship hereby insured, we, the assurers, will pay the assured such proportion of such sum or sums so paid as our subscriptions hereto bear to the value of the ship hereby insured. And in cases where the liability of the ship has been contested with the consent, in writing, of a majority of the underwriters on the hull and / or machinery (in amount), we will also pay a like proportion of the costs thereby incurred or paid; but when both vessels are to blame, then, unless the liability of the owners of one or both of such vessels becomes limited by law, claims under the collision clause shall be settled on the principle of cross-liabilities as if the owners of
13 each vessel had been compelled to pay to the owners of the other of such vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the assured in consequence of such collision.

And it is further agreed that the principles involved in this clause shall apply to the case where both vessels are the property, in part or in whole, of the same owners, all questions of responsibility and amount of liability as between the two ships being left to the decision of a single arbitrator, if the parties can agree upon a single arbitrator, or failing such agreement, to the decision of arbitrators, one to be appointed by the managing owners of both vessels, and one to be appointed by the majority in amount of underwriters interested in each vessel; the two arbitrators chosen to choose a third arbitrator before entering upon the reference. The terms of the arbitration act of 1889 to apply to such reference, and the decision of such single, or of any two of such three arbitrators, appointed as above, to be final and binding.

Provided always that this clause shall in no case extend to any sum which the assured may become liable to pay, or shall pay, for removal of obstructions, under statutory powers, for injury to harbours, wharves, piers, stages and similar structures, consequent on such collision, or in respect of the cargo or engagements of the insured vessel, or for loss of life or personal injury.

£75. Stanley Hoole,
£75. Charles E. Green,
£75. Henry Green,
£75. George F. Green,
£75. Cyril Wintle,
£75. R. G. MacMillan,
£75. H. W. Murray,
£75. I. C. MacMillian,
} J. W. Hoole seventy-five ps. each 18 Nov., 1898.

£75. D. Janson,
£75. F. Barkworth,
£75. G. H. Lloyd,
£75. Percy Janson,
£75. J. Mosenthal,
} per A. H. Henderson seventy-five pds. each 18 Nov., 1898.

£750. One-tenth each.
Geo. H. Faber,
F. Laeisz,
B. R. Fleming,
Geo. Blundell,
J. Taylor Smith,
H. Bunting,
H. L. Faber,
H. H. Andrew,
R. L. Pugh,
E. Hobson,
} One-tenth each of seven hdd. & fifty pds. p. S. Garrard.

£75. F. Elliot Smith, p. S. Garrard, seventy-five pds. 18 Nov., 1898.

£75. C. I. de Rougemont,
£75. G. H. Valentine,
£75. J. E. Barkworth,
£75. H. B. B. Kent,
£75. L. E. Y. Turner,
£75. Edward Murray,
} per G. H. Valentine, seventy-five pds. each 18 Nov., 1898.
21/11.

14 £75. H. G. Poland,
£75. A. Hicks,
£75. J. R. Vaizey,
£75. F. P. Fletcher-Vane,
} p. H. W. Waite, seventy-five pds. each 18 Nov. 1898.

£50. Stephen White,
£50. Wm. B. Liddiard,
£50. Wm. C. Maxwell,
£50. Chas. E. Moser,
£50. L. C. C. Lindsay,
£50. S. J. White,
} p. S. J. White, fifty pds. each 18 Nov. 1898.

£75. Ernest F. Stearns,
£75. John E. Hammick,
} p. J. E. Hammick, seventy-five pds each 18 Nov. 1898.

£50. Holford Secretan,
£50. L. M. Secretan,
£50. T. A. Nicholls,
£50. C. F. Tufnell,
} p. T. A. Nicholls, fifty £ each 18 Nov. 1898. 22/11.

£49. C. A. Hewitt, } p. A. Burchard, forty-nine pd. 18 Nov. 1898.

£125. F. W. Marten, } One hdd. twenty-five pds.

£75. M. Buller,
£75. R. Williamson,
£75. W. Milburn,
£75. A. E. Burr,
£75. E. H. Banks,
£75. C. V. E. Laurie,
£75. A. Bilbrough,
£75. W. H. Anderson,
£75. Cecil E. Laurie,
£75. A. W. Bilbrough,
} Seventy-five pds. each. 22/11. } Thos. Stewart, 18 Nov. 1898.

15 London, 18th Nov., '98.

No. 3 ferry-boat.

12 months noon, 16th Nov., '98.

£4,124: on hull, &c.

Ac...	20.12.5
Policy	1. .1
	£21.13.5

Room 48.

No. 2357.

Johnson & Higgins,
average adjusters and insurance brokers,
5931,
12 Central St., Boston.

In the event of accident whereby loss or damage may result in a claim under this policy, the settlement will be much facilitated if immediate notice be given to the nearest Lloyd's agent.

16170. 12349.

Losses and returns, if any, payable to the city of Boston, or order.
JOHNSON & HIGGINS.

16 *Record.*

This indictment was found and returned into said superior court by the grand jurors on the eleventh day of March, A. D. 1899, and on the fourteenth day of said March, said Nutting came into said court and was set at the bar and having said indictment read to him, he said thereof that he was not guilty. Thereupon the court ordered that said Nutting recognize to said Commonwealth with sufficient sureties in the sum of one hundred dollars for his appear-

ance before said court from day to day and sitting to sitting to answer further to said indictment and abide the final decree and order of said court thereon and not depart without leave, and said Nutting recognized personally in said sum, and deposited said sum with the clerk of said court in lieu of said sureties.

On the twenty-fourth day of April, A. D. 1899, the said Nutting was set at the bar and for trial put himself upon the country, and the Commonwealth did the like by its attorney John D. McLaughlin, Esquire.

A jury was empanelled and sworn to try the issue, to wit, Caleb P. Buckman, foreman and eleven of his fellows, who, after hearing and understanding all matters and things concerning the same, returned their verdict and on oath said that said Nutting was guilty.

On the eighth day of May, A. D. 1899, the said Nutting, by his attorneys, filed exceptions to the rulings of the court, time having been extended for the filing of the same.

On the fourteenth day of June, A. D. 1899, the exceptions aforesaid, being examined and found conformable to the truth, were allowed and were ordered to be transmitted to the supreme judicial court of said Commonwealth, and said indictment was ordered to be continued to await the determination of the justices of said court.

Attest: JOHN P. MANNING, *Clerk.*

[Endorsed:] No. —. Commonwealth *vs.* Charles H. Nutting. Defendant's exceptions. Suffolk county.

17 On the fourth day of January, A. D. 1900, a rescript was received from said supreme court in the words following: "Exceptions overruled."

The following is said rescript:

18 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, January, 1900.

In the case of Commonwealth *vs.* Charles H. Nutting, pending in the superior court for the county of Suffolk—

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court, viz:

Exceptions overruled.

By the court:

HENRY A. CLAPP, *Clerk.*

January 4, 1900.

19 *Brief Statement of the Grounds and Reasons of the Decision.*

The legislature has power to prohibit agents of foreign insurers and brokers from soliciting or acting in regard to foreign insurance

in this State even though they shall agree with the assured that they are his agents.

See opinion.

A true copy.
Attest: JOHN P. MANNING, *Clerk.*

19½ [Endorsed:] 10. No. 1450. Supreme judicial court for the Commonwealth. Rescript, Suffolk county. Commonwealth *vs.* Charles H. Nutting. Received Jan. 4, 1900. Copy.

20 On the twenty-ninth day of said January the said Nutting is set at the bar to receive sentence.

It is therefore considered by the court that the said Nutting, for his offence as set forth in said indictment, pay a fine of four hundred dollars, and that he stand committed until said sentence be complied with.

Paid.

21 All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have caused the seal of our superior court to be hereunto affixed.

Witness Albert Mason, Esquire, chief justice of our said superior court, at Boston, this nineteenth day of February, in the year of our Lord one thousand nine hundred.

[Seal of the Superior Court.]

JOHN P. MANNING, *Clerk.*

22 The following is the application for the writ of error and the assignments of error:

23 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

COMMONWEALTH
vs.
CHARLES H. NUTTING.

To the Honorable Albert Mason, chief justice of the superior court of the Commonwealth of Massachusetts:

Your petitioner, the defendant in the above-entitled cause of action, complains that errors of law appear in the record of the above-entitled cause of action, and respectfully petitions for a writ of error to the Supreme Court of the United States, and that you will issue a citation to the Commonwealth of Massachusetts upon said writ of error, and herewith files his assignments of errors as follows:

I.

That upon all the evidence the acts charged in the indictment against said Charles H. Nutting were done without the jurisdiction of the Commonwealth of Massachusetts, and the conviction of said

Charles H. Nutting was for that reason repugnant to the provisions of the Constitution of the United States, and particularly the fourteenth amendment thereof.

II.

That upon all the evidence the acts of said Charles H. Nutting were such as he had right to do under and by virtue of the provisions of the Constitution of the United States, and particularly the fourteenth amendment thereof, and the conviction of said Charles H. Nutting therefor was for that reason repugnant to said provisions of said Constitution.

24 III.

That upon all the evidence the acts of said Charles H. Nutting were such as he had right to do under and by virtue of the provisions of the Constitution of the United States, and particularly the fourteenth amendment thereof; but the courts below interpreted the provisions of chapter 522, Acts of 1894 of the Commonwealth of Massachusetts, and particularly sections 3, 87, 93, and 98 thereof, as intending to forbid said acts of said Nutting and make same unlawful, and thereupon erred in holding that said statutes of said Commonwealth were valid as so interpreted and not repugnant to said provisions of said Constitution.

IV.

That upon all the evidence the negotiating and consummating of the contract of insurance concerned and the delivery of the policy and payment of the premium therefor where done wholly without the jurisdiction of the Commonwealth of Massachusetts, and said Charles H. Nutting had right to do the same under and by virtue of the provisions of the Constitution of the United States, and particularly the fourteenth amendment thereof; but the courts below interpreted chapter 522, Acts of 1894 of said Commonwealth, and particularly sections 3, 87, 93, and 98 thereof, as intending to forbid said acts of said Nutting, and thereupon erred in holding that said statutes of said Commonwealth were valid as so interpreted and not repugnant to said provisions of said Constitution.

V.

That upon all the evidence the only acts of said Charles H. Nutting done within the jurisdiction of said Commonwealth were to
25 seek and receive employment by a citizen of said Commonwealth as the servant of such citizen only, to obtain insurance upon property of his said employer located in said Commonwealth, and, pursuant to such employment and not otherwise, to receive the order of his said employer for said insurance and mail the same to persons in the State of New York, and thereafter, a contract for said insurance on said property of his said employer having been negotiated and consummated by and the policy there-

for delivered to and premium thereon paid by others wholly without the jurisdiction of said Commonwealth, acting in the premises solely as the servants of his said employer, and the said policy having thereafter come into the possession of said Nutting in said Commonwealth, but solely as the servant of his said employer, to mail said policy to his said employer as the owner thereof; that said acts of said Charles H. Nutting so done within said Commonwealth he had right to do under and by virtue of the provisions of the Constitution of the United States, and particularly the fourteenth amendment thereof; but the courts below interpreted the provisions of chapter 522, Acts of 1894 of said Commonwealth, and particularly sections 3, 87, 93, and 98 thereof, as intending to forbid such acts and make the same unlawful, and erred in holding said statutes of said Commonwealth valid and not repugnant to said provisions of said Constitution.

Wherefore the said petitioner, Charles H. Nutting, prays that the said judgment be reversed, annulled, and altogether held for naught, and that he may be restored to all things that he has lost by occasion of said judgment.

CARVER & BLODGETT,
Attorneys for the Defendant.

26 The foregoing application was allowed by the chief justice of said superior court, and said Nutting was ordered by said superior court to furnish a bond, with sureties, in the sum of one thousand dollars to prosecute said writ in said Supreme Court of the United States, and said Nutting furnished said bond as required, and the same was approved by the chief justice of said court.

27 COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss*:

Superior Court for the Transaction of Criminal Business.

BOSTON, *February 20th*, 1900.

I, John P. Manning, clerk of said superior court, do hereby certify that the foregoing are true copies of the record of said superior court in the case of The Commonwealth *vs.* Charles H. Nutting.

I. Indictment;
II. Record and judgment of said court in said case;
III. Opinion of supreme judicial court of Mass.;
IV. And of all the proceedings in the case, with all things concerning the same, together with the—
V. Original writ, citation, and acknowledgment of service.

Seal of the Superior Court.

In testimony whereof I hereunto set my hand and affix the seal of said superior court, at said Boston, this twentieth day of February, in the year of our Lord one thousand nine hundred.

JOHN P. MANNING, *Clerk.*

28 The following are the opinions of the supreme judicial court for the Commonwealth:

28½ COMMONWEALTH OF MASSACHUSETTS:

BOSTON, *February* 20, 1900.

I certify the annexed to be a true copy of the opinion of the supreme judicial court in the case of Commonwealth *vs.* Nutting, decided on the 4th day of January, 1900.

GEO. F. TUCKER,
Reporter of Decisions.

29 (Copy.)

COMMONWEALTH
vs.
NUTTING.

HOLMES, *C. J.:*

The defendant is indicted for acting in the negotiation and transaction of unlawful insurance by negotiating in Boston with foreign insurers not admitted to do insurance business in this Commonwealth and procuring a policy of insurance upon a vessel in Boston, to be issued by them. The agreed facts sustain the indictment, subject to certain questions which are brought before us by exceptions to a ruling that the facts warranted *by* the jury in finding the defendant guilty and to the refusal of several requests which need not be mentioned in detail.

30 The foundation of the defendant's argument is the decision in Allgeyer *v.* Louisiana, 165 U. S., 578. That was a proceeding by the State to recover a penalty for violating the State law, intended to prevent dealing with any marine insurance company that had not complied with the law. The defendants were the parties insured. The policy, an open one, was issued outside the State, and the only act done within the State was the mailing of a letter describing certain cotton to which the defendants desired the policy to attach. But the court intimate somewhat broadly that a State legislature cannot make it unlawful for a man to make a contract of insurance outside the State, although he resides and is present in the State at the time when the contract is made. It now is contended that, if this is so, it cannot be unlawful for another man to obey a request to get such insurance, if made by the one who wants it, and that the contract in the present case was made outside the Commonwealth on principles which cannot be affected by St. 1894, c. 522, sec. 3. It might be argued further that at the least this was not unlawful insurance, and so that this particular indictment fails, whether the defendant had done a punishable act or not.

31 We bow to the decision and even to the intimations of the case cited without criticism; but that case expressly leaves intact the settled power of the State to impose such conditions as it pleases upon the doing of any business by foreign insurance companies within its borders. Although the reasoning of many of the

cases turns on the fact that such companies are corporations, we apprehend that the power is not dependent upon that fact, but is an unsurrendered portion of the State's general right to legislate. See 165 U. S., 591; Leavenworth *v.* Booth, 15 Kans., 627, 634. One main object in imposing such conditions in this Commonwealth is to secure people against fraudulent or worthless contracts and, in case of litigation, to save them from having to go abroad. See Lamb *v.* Lamb, 4 Biss., 420, 422. We assume, until it is otherwise decided, that the power to enforce these objects will be regarded as too important and substantial to be defeated by a device, even though the device, apart from its purpose, would only embody a common-law right. We are of opinion, therefore, that notwithstanding the right of McKie, if so minded, to apply from Boston to the London Lloyds for insurance, the legislature has power to prohibit the agents of the Lloyds as well as the Lloyds themselves from soliciting business in Boston and to make that prohibition effectual by providing that it shall not be escaped by an agreement making the solicitors the agents of the insured in the transaction. In
32 other words, while the legislature cannot impair the freedom of McKie to elect with whom he will contract, it can prevent the foreign insurers from sheltering themselves under his freedom in order to solicit contracts which otherwise he would not have thought of making. It may prohibit not only agents of the insurers, but also brokers, from soliciting or intermeddling in such insurance, and for the same reasons. What we have said goes very little, if any, further than what is laid down in similar terms in Hooper *v.* California, 155 U. S., 648, 657, 658, and the authority of that case is saved in terms in Allgeyer *vs.* Louisiana, and is recognized again in Orient Ins. Co. *vs.* Daggs, 172 U. S., 557, 566. See, further, Pierce *vs.* People, 106 Ill., 11.

33 What the legislature can do it has done by St. 1894, c. 522. By sec. 3: "It shall be unlawful * * * for any person as insurance agent or insurance broker to make, negotiate, solicit, or in any manner aid in the transaction of" insurance upon any property or interests in this Commonwealth or with any resident thereof, except as authorized by the act. By section 98: "Any person who shall act in any manner in the negotiation or transaction of unlawful insurance with a foreign insurance company not admitted to do business in this Commonwealth or who as principal or agent shall violate any provision of this act in regard to negotiation or effecting contracts of insurance" is subjected to a penalty.

34 Whether the description in the insurance in the indictment as unlawful be rejected as surplusage or whether the insurance be held to be unlawful within the meaning of the act, an indictment because transacted through a broker acting unlawfully, an offence under the statute is set forth, and the defendant properly was convicted. It is unnecessary to consider whether the same result could be reached in another way. Possibly, for the reasons given above, it would be within the power of the legislature to enact that the insurance broker should be regarded as the agent of the insurers, whatever the agreement of the parties, and in that way

reach the result that any contract made through him when he and the insured were here would be made in this State, and thus would be subject to our laws. Possibly it might be argued that such was the effect of our statute, although, if so, it fails to state it as clearly as could be wished. See sections 3 and 87, 90.

Exceptions overruled.

[Endorsed:] Commonwealth *vs.* Nutting.

34½ [Endorsed:[Commonwealth *vs.* Nutting. Certified copy of the opinion of the supreme judicial court.

34½ The following is the original citation and acknowledgment of service:

35 UNITED STATES OF AMERICA, *ss:*

To the Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the tenth day of March next, pursuant to a writ of error filed in the clerk's office of the superior court of the Commonwealth of Massachusetts, holden for the transaction of criminal business within and for the county of Suffolk, wherein Charles H. Nutting is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Albert Mason, chief justice of the superior court of the Commonwealth of Massachusetts, this seventeenth day of February, in the year of our Lord one thousand nine hundred.

[Seal of the Superior Court.]

ALBERT MASON.

I accept due service of the foregoing citation.

HOSEA M. KNOWLTON,
Attorney General of Mass.

36 Know all men by these presents that we, Charles H. Nutting, of Boston, in the county of Suffolk and Commonwealth of Massachusetts, as principal, and E. P. Greene, of Boston, in said county, and William R. Hedge, of said Boston, as sureties, are held and firmly bound unto the Commonwealth of Massachusetts in the full and just sum of one thousand (1,000) dollars, to be paid to the said Commonwealth of Massachusetts; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this seventeenth day of February, in the year of our Lord one thousand nine hundred.

Whereas lately, at a hearing before the superior court of the Commonwealth of Massachusetts, holden for the transaction of criminal business at Boston, within and for the county of Suffolk, in a suit

depending in said court between the Commonwealth of Massachusetts and Charles H. Nutting, judgment was rendered against the said Charles H. Nutting, and the said Charles H. Nutting having procured a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Commonwealth of Massachusetts, citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington on the tenth day of March next:

Now, the condition of the above obligation is such that if
37 the said Charles H. Nutting shall prosecute his writ of error to effect and answer all damages and costs if he fails to make his plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

C. H. NUTTING. [SEAL.]
E. P. GREENE. [SEAL.]
WILLIAM R. HEDGE. [SEAL.]

Signed and sealed in presence of—
GEORGE BEAN, JR.,

Approved:
H. M. KNOWLTON,
Att'y Gen'r'l.

Approved:
ALBERT MASON, *C. J. S. C.*

A true copy of the bond taken by the judge at the time of the allowance of the writ of error named in said bond, which bond is on file in the office of the clerk of the superior court of the Commonwealth aforesaid, within and for said county.

[Seal of the Superior Court.]

Attest:
JOHN P. MANNING,
Clerk Superior Court Aforesaid.

Endorsed on cover: File No., 17,655. Massachusetts superior court. Term No., 541. Charles H. Nutting, plaintiff in error, *vs.* The Commonwealth of Massachusetts. Filed February 26th, 1900.

No.

Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed April 6, 1901.

No. 212.

CHARLES H. SUTTING, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

BRIEF FOR THE PLAINTIFF IN ERROR.

J. HUBLEY ASHTON,
Of Counsel for Plaintiff in Error.

John A. Darrow, Printer, Washington, D. C. 4/01

Supreme Court of the United States

OCTOBER TERM, 1900.

No. 212.

CHARLES H. NUTTING, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The plaintiff in error was the defendant in an indictment returned into the Superior Court of the Commonwealth of Massachusetts within and for the county of Suffolk, under the act of the legislature of Massachusetts, entitled "*An act to amend and codify the statutes relating to insurance*," approved June 25, 1894, charging him with negotiating and transacting unlawful insurance with a foreign insurance company not admitted to do business in that State.

The indictment, found by the grand jury on March 11, 1899, was based upon *section 98* of the statute above mentioned, being chapter 522 of the Acts of 1894, which, by *section 1*, may be cited as the Massachusetts Insurance Act of 1894 (Massachusetts Acts and Resolves, 1894, p. 675).

Section 98 of this statute provides as follows:

"Any person who shall assume to act as an insurance agent or insurance broker without license therefor as herein provided, *or who shall act in any manner in the negotiation or transaction of unlawful insurance with a foreign insurance company not admitted to do business in this Commonwealth*, or who as principal or agent shall violate any provision of this act in regard to the negotiation or effecting of contracts of insurance, shall be punished by fine of not less than one hundred nor more than five hundred dollars for each offence."

The indictment charged that the defendant, Charles H. Nutting, of Boston, on the 18th day of November, 1898, at Boston, "did act in the negotiation and transaction of unlawful insurance with a foreign insurance company not admitted to do business in said Commonwealth by then and there for one William McKie, of said Boston, negotiating with and procuring to be issued by divers certain individuals as insurers a certain contract and policy of insurance against loss upon a certain vessel of said McKie there situate, the said individuals then being associated, organized, and engaged as principals in the business of insurance under and by authority of the government of the United Kingdom of Great Britain and Ireland, and said individuals not being then and there admitted to do insurance business in said Commonwealth according to law, against the peace of said Commonwealth and contrary to the form of the statute in such cases made and provided" (Record, pp. 2, 3).

The defendant pleaded not guilty, and the case was tried by the court and jury upon an agreed statement of facts in writing, as follows:

1. Some time prior to the 18th day of November, 1898, Charles H. Nutting, of Boston, solicited from William McKie, a ship-builder in Boston, the business of procuring insurance upon a vessel then in process of construction by McKie in his ship yard in Boston.

2. Nutting, at said time, was a licensed insurance broker in Boston, and attorney and agent of Johnson & Higgins, average adjusters and insurance brokers, having an office in Boston, at 12 Central street, in charge of the defendant and another, and having a principal office in New York city, New York.

3. Some time after McKie was so solicited by the defendant for said business, as aforesaid, Nutting, acting as agent for said Johnson & Higgins, secured the authority of McKie to the placing of a contract of insurance for £4,124 upon said vessel.

4. Thereupon Nutting transmitted an order for said insurance to said Johnson & Higgins, of New York, and said Johnson & Higgins at once wrote to John D. Tyson and Company, of Liverpool, England, they being the Liverpool agents of said Johnson & Higgins, to procure insurance upon the said vessel of McKie for the amount of £4,124.

5. Thereupon John D. Tyson and Company, pursuant to said request to procure a policy of marine insurance, did procure a policy (a copy of which is annexed) to be issued

and delivered at Liverpool by the London Lloyds to John D. Tyson and Company in favor of said Johnson & Higgins, and "on account of whom it may concern, as well in their own name as for and in the name and names of all and every other person or persons to whom the same doth, may or shall appertain;" John D. Tyson and Company, at the time of receiving said policy, advancing and paying the premiums thereon for account of Johnson & Higgins, John D. Tyson and Company receiving a commission upon said insurance from said Lloyds for and on account of themselves and of Johnson & Higgins.

6. At all the times mentioned, said London Lloyds were individual insurers, citizens of England, associated and engaged as principals in the business of insurance under and by authority of the government of the United Kingdom of Great Britain and Ireland, and carrying on said business in England upon the Lloyds' plan, whereby each associate underwriter becomes liable for a proportionate part of the whole amount insured by a policy.

7. John D. Tyson and Company, having received said policy from the London Lloyds, sent the policy to Johnson & Higgins of New York, and Johnson & Higgins in New York having made the endorsement which appears on the back of said policy at the request of McKie, sent the policy by mail to the defendant, who, thereupon, at Boston, on November 18, 1898, sent the same by mail to McKie; said London Lloyds not having complied with any of the requirements imposed by the laws of Massachusetts and not being admitted to do insurance business in this Commonwealth according to law.

8. The said policy was procured for McKie from the London Lloyds, as aforesaid, for compensation in the usual course of the business of Johnson & Higgins, and John D. Tyson and Company, and the defendant.

9. Charles H. Nutting and William McKie were at all the times mentioned in the indictment, and in this statement, citizens of the Commonwealth of Massachusetts.

10. Neither John D. Tyson and Company, nor Johnson & Higgins, nor Charles H. Nutting, were agents for said London Lloyds except so far as the facts stated constitute them such agents, and the term "broker," is not to be interpreted as meaning that they were such agents except so far as the facts herein stated constitute them such agents (Agreed Statement of Facts, *Ib.*, pp. 5, 6).

A copy of the policy of marine insurance effected at Lloyd's by John D. Tyson and Company of Liverpool, as above stated, is annexed, as Exhibit "D," to the agreed statement of facts (*Ib.*, pp. 8–13).

The policy is dated, London, the 18th of November, 1898, and is in the archaic form of "Lloyd's policy," which, Mr. Hopkins states, "is probably substantially the same as it was three centuries ago" (Hopkins, Manual of Marine Insurance, Phila. ed., 1867, p. 116). The policy is stamped and described as "printed at Lloyd's Royal Exchange," and "issued in the form printed and supplied by the Government previous to 1st August, 1887, except that the free of capture clause has been inserted." It contains the familiar clauses:

"And it is agreed by us the insurers that this writing or policy of assurance shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard street, or in the Royal Exchange, or elsewhere in London."

"And so we the assurers are contented, and do hereby promise and bind ourselves each one for his own part, our heirs, executors, and goods, to the assured, their executors, administrators, and assigns, for the true performance of the premises, confessing ourselves paid the consideration due unto us for this assurance by the assured at and after the rate of ten shillings per cent."

The policy is separately signed by or on behalf of some fifty-eight persons, underwriting members of Lloyd's, who respectively subscribed for several different sums, amounting in all to 4,124 pounds sterling, agreeably to the custom and rule of Lloyd's, as stated by Mr. Hopkins, that "in signing, it is necessary that every underwriter should write his name separately, with the amount he undertakes, and the date of the subscription; and if the policy is signed by a substitute, the signature of the latter must be also inserted, and when one person undertakes for three or four names, he must still write each 'line' in full, not using the word 'ditto' in the repetitions" (Manual of Marine Insurance, p. 82).

The facts thus stipulated being all the evidence in the case, the defendant's counsel asked the Superior Court at the trial to make certain separate rulings (*infra*), but the court refused to make any of such rulings, and the defendant excepted to such refusals.

The court thereupon instructed the jury that upon the evidence set out in the agreed statement of facts, they would be warranted in finding the defendant guilty, to which the defendant also duly excepted.

The jury having returned a verdict of guilty, the defendant filed his exceptions to the rulings of the court, which were duly allowed, and were ordered to be transmitted to the Supreme Judicial Court of the Commonwealth. The indictment was then continued to await the decision of that court.

The rulings thus requested by the defendant at the trial and refused by the Superior Court, are as follows:

First. That on all the evidence in the case, the court should direct the jury to return a verdict of not guilty.

Second. That on all the evidence in the case, the jury would not be warranted in finding a verdict of guilty.

Third. That on all the evidence in the case, no unlawful act has been committed by the defendant.

Fourth. That the contract of insurance set forth in the evidence was made entirely outside the Commonwealth of Massachusetts.

Fifth. That the defendant cannot be held criminally liable for an act done without the State; and the last clause of section 3 of chapter 522 of the Acts of 1894 of the Commonwealth, providing that all contracts of insurance on property, lives or interests in this Commonwealth shall be deemed to be made therein, cannot make a contract entered into without the Commonwealth of Massachusetts an act done within the Commonwealth for the purposes of criminal liability, and is null and void in so far as it purports so to do.

Sixth. That so much of section 3 of chapter 522 of the Acts of 1894 of the Commonwealth of Massachusetts as provides that all contracts of insurance on property, lives or interests in this Commonwealth shall be deemed to be made therein, and as attempts to make a contract entered into without the Commonwealth of Massachusetts an act done within the Commonwealth, is contrary to the provisions of the Constitution of the United States, and is unconstitutional and void.

Seventh. That so much of section 87 of chapter 522 of the Acts of 1894 of the Commonwealth of Massachusetts as purports to make illegal such acts as were done by the defendant in this case, is contrary to the provisions of the Constitution of the United States and is unconstitutional and void.

Eighth. That so much of section 98 of chapter 522 of the Acts of 1894 of the Commonwealth of Massachusetts as purports to make illegal such acts as were done by the defendant in this case, is contrary to the provisions of the Constitution of the United States, and is unconstitutional and void.

Ninth. That the defendant acted merely as the agent of the assured in obtaining the contract of insurance set forth in this case.

Tenth. That the defendant in no way represented the London Lloyds (the insurers) in relation to the contract of insurance set forth in this case.

Eleventh. That so much of chapter 522 of the Acts of 1894 of the Commonwealth of Massachusetts as purports to make illegal such acts as were done by the defendant in this case, is contrary to the provisions of the fourteenth amendment of the Constitution of the United States and is unconstitutional and void.

The Supreme Judicial Court of the State overruled the defendant's exceptions in an opinion delivered by Chief Justice Holmes (*Ib.*, pp. 18–20; Commonwealth *vs.* Nutting, 175 Mass., 154).

The Superior Court thereupon sentenced the plaintiff in error to pay a fine of four hundred dollars and ordered that he stand committed until this sentence be complied with (Record, p. 15).

The defendant sued out the present writ of error to that judgment, which was allowed by the Chief Justice of the Superior Court (*Ib.*, pp. 15–17).

ASSIGNMENT OF ERRORS.

I. The Superior Court below erred in refusing the requests of the plaintiff in error for rulings at the trial, and particularly the Fifth, Sixth, Seventh, Eighth, and Eleventh requests, and the Supreme Judicial Court of Massachusetts erred in overruling the exceptions to the refusals of the Superior Court to grant the said requests.

II. Upon all the evidence the acts charged in the indictment against the plaintiff in error were done without the jurisdiction of the Commonwealth of Massachusetts, and the conviction of the plaintiff in error was for that reason repugnant to the provisions of the Constitution of the United States, and particularly the Fourteenth Amendment thereof.

III. The courts below erred in not holding and deciding that the plaintiff in error cannot be held criminally liable for an act done without the State, and that the last clause of section 3 of chapter 522 of the Acts of 1894 of the Commonwealth of Massachusetts, providing that all contracts of insurance on property, lives, or interests in the said Commonwealth shall be deemed to be made therein, cannot make a contract entered into without the Commonwealth of Massachusetts an act done within the said Commonwealth for the purposes of criminal liability, and is null and void in so far as it purports so to do.

IV. The courts below erred in not holding and deciding that so much of section 3 of chapter 522 of the Acts of 1894 of the Commonwealth of Massachusetts as provides that all contracts of insurance on property, lives, or interests in the Commonwealth shall be deemed to be made therein, and as purports and attempts to make a contract entered into without the said Commonwealth an act done within it, for the purposes of criminal liability, is, in its application to this case, repugnant to and in violation of the provisions of the Constitution of the United States, and particularly the Fourteenth Amendment thereof, and is null and void.

V. Upon all the evidence the acts of the plaintiff in error were such as he had the right to do and perform under and by virtue of the provisions of the Constitution of the United States, and particularly the Fourteenth Amendment thereof, and the conviction of the plaintiff in error therefor was for that reason repugnant to the provisions of that Constitution.

VI. The courts below erred in holding and deciding that the provisions of chapter 522 of the Acts of 1894 of the Commonwealth of Massachusetts, and particularly sections 3, 87, 93, and 98 thereof, which were interpreted as intending to forbid the acts done by the plaintiff in error, and to make the same unlawful and criminal, were constitutional and valid as so interpreted, and were not as so interpreted repugnant to and in violation of the Constitution of the United States, and particularly the Fourteenth Amendment thereof.

*

VII. The courts below erred in holding and deciding that the provisions of chapter 522 of the Acts of 1894 of the Commonwealth of Massachusetts, and particularly sections 3, 87, 93, and 98 thereof, as interpreted and applied in this case, do not as so interpreted and applied deprive the plaintiff in error of his liberty and property, without due process of law, and do not as so interpreted and applied deny to the plaintiff in error the equal protection of the laws, in violation of the Fourteenth Amendment of the Constitution of the United States.

VIII. The courts below erred in holding and deciding that the provisions of chapter 522 of the Acts of 1894 of the Commonwealth of Massachusetts, and particularly sections 3, 87, 93, and 98 thereof, as interpreted and applied in this case, do not as so interpreted and applied deprive the plaintiff in error of his liberty and freedom to contract, in violation of the Constitution of the United States.

IX. The courts below erred in rendering judgment herein in favor of the Commonwealth of Massachusetts and against the plaintiff in error.

ARGUMENT.

FIRST.

The case as presented by the provisions of the Massachusetts Insurance Act, the agreed facts, and the judgment of the Supreme Judicial Court overruling the exceptions.

1. *Section 3* of the Massachusetts Insurance Act of 1894 (containing one hundred and twelve sections) provides:

"A contract of insurance is an agreement by which one party for a consideration promises to pay money or its equivalent or to do some act of value to the assured upon the destruction, loss or injury of something in which the other party has an interest, and it shall be *unlawful* for any company to make any contract of insurance *upon or concerning any property or interests or lives in this Commonwealth*, or *with any resident thereof*, or for any person as insurance agent or insurance broker to make, negotiate, solicit or in any manner aid in the transaction of such insurance, unless and except as authorized under the provisions of this act."

And at the end of this section it is declared:

"All contracts of insurance on property, lives or interests in this Commonwealth shall be *deemed to be made therein*."

By *section 1* it is provided that "when consistent with the context and not obviously used in a different sense the term 'company,' or 'insurance company,' as used herein, includes all corporations, associations, partnerships or individuals engaged as principals in the business of insurance; the word 'domestic' designates those companies incorporated or formed in this Commonwealth, and the word 'foreign,' when used without limitation, includes all those formed by authority of any other State or government."

Section 77 provides that "foreign insurance companies upon complying with the conditions herein set forth, applicable to such companies, may be admitted to transact in this Commonwealth by constituted agents resident therein any class of insurance authorized by the laws of the Commonwealth."

Sections 78, 79, and 80 prescribe the conditions of the admission of foreign insurance companies, and prohibit them from doing business in the State until the prescribed conditions are complied with.

Section 86 provides:

"Associations of individuals, *citizens of the United States*, whether organized within the Commonwealth or elsewhere within the United States, formed upon the plan known as Lloyds—whereby each associate underwriter becomes liable for a proportionate part of the whole amount insured by a policy—may be authorized to transact insurance other than life in this Commonwealth, in like manner and upon the same terms and conditions as are required of and imposed upon insurance companies of other of the United States."

Section 87 provides that "any person not a duly licensed insurance broker, who solicits insurance on behalf of any insurance company, or transmits for a person other than himself an application for or a policy of insurance to or from such company, or offers or assumes to act in the negotiation of such insurance, shall be deemed an insurance agent within the intent of this act, and shall thereby become liable to all the duties, requisitions, liabilities and penalties to which an agent of such company is subject."

Section 89 makes an insurance agent liable on all contracts effected by or through him directly or indirectly for or on behalf of any company not authorized to do business in the Commonwealth.

Section 90 provides that "an insurance agent or broker who acts for a person other than himself in negotiating a contract of insurance by an insurance company shall, for the purpose of receiving the premium therefor, be held to be the company's agent, whatever conditions or stipulations may be contained in the policy or contract."

And *section 98*, upon which the indictment in this case was based, provides that "any person who shall assume to act as an insurance agent or insurance broker without license therefor as herein provided, or who shall act in any manner in the negotiation or transaction of unlawful insurance with a foreign insurance company not admitted to do business in this Commonwealth, or who as principal or agent shall violate any provision of this act in regard to the negotiation or effecting of contracts of insurance, shall be punished by fine," &c.

2. Mr. Nutting, as seen, was charged in the indictment, as based on this *98th* section, with acting on November 18, 1898, at the city of Boston, in the negotiation and transaction of unlawful insurance with a foreign insurance company not admitted to do business in the State, by then and there for one McKie of Boston negotiating with and procuring to be issued by divers individuals as insurers a certain policy of insurance against loss upon a vessel of McKie there situate, such individuals being engaged in the business of insurance under the authority of the United Kingdom of Great Britain and Ireland, and not admitted to do business in Massachusetts.

The highest court of the State, overruling all the exceptions, adjudged that the provisions of the several sections of

the act of 1894, under which the plaintiff in error was convicted of the offense charged in the indictment, were not, as interpreted and applied in this case, in conflict with the Constitution of the United States.

3. It appears by the agreed facts that the only acts or things in the present matter done by Mr. Nutting in the territory and jurisdiction of the State of Massachusetts, before he received by mail, in Boston, from his principals, in New York, the Lloyd's policy of insurance in question, effected in London by Tyson and Company of Liverpool, were (1) to solicit from William McKie, a citizen of the United States, and a ship-builder in Boston, the business of procuring insurance upon a vessel then being built by McKie in his Boston ship yard, (2) to secure, as agent for Johnson & Higgins of New York, McKie's authority to the placing of a contract of insurance upon his vessel, and (3) to transmit an order for such insurance to Johnson & Higgins, of New York.

The order for the insurance specified no particular insurance, but left Johnson & Higgins free to procure the insurance where they could.

Mr. Nutting did nothing more in the matter, and nothing else whatever in the territory and jurisdiction of the State, before and until he received by mail in Boston the policy of insurance in question from Johnson & Higgins in New York, when he simply mailed the policy to Mr. McKie in Boston.

When Johnson & Higgins in New York received from Mr. Nutting the order for the insurance, they requested Tyson and Company, of Liverpool, England, to procure in England a policy of marine insurance upon McKie's vessel for the

amount required. No insurers were named or suggested. The risk was offered by Tyson and Company to the London Lloyds. They accepted it, agreed with Tyson and Company as to the premiums, executed in London a time policy of marine insurance on McKie's vessel, and delivered the policy at Liverpool to Tyson and Company, who at the time of receiving the policy advanced and paid the premiums for account of Johnson & Higgins. The policy was effected by Tyson and Company in the name of "Johnson & Higgins, on account of whom it may concern, as well as in their own name, as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all."

Tyson and Company having sent the policy from Liverpool to Johnson & Higgins in New York, Johnson & Higgins there endorsed the policy over to McKie and transmitted it by mail to Mr. Nutting, who mailed it at Boston to McKie, who was indebted to Johnson & Higgins for the amount of the premiums advanced, and presumably reimbursed them.

(a.) *The policy was subscribed by the underwriters in London on the 18th of November, 1898, was payable in England only, and was unquestionably a lawful and valid English contract, and not a Massachusetts contract.*

The authority of the Massachusetts case of *Commonwealth Mutual Fire Insurance Company vs. Knabe Manufacturing Company* (171 Mass., 265), is satisfactory and sufficient on that point. (See *infra.*)

The policy as above stated, is in the form in use at Lloyd's in London (being commonly called the "Lloyd's policy"),

which was a form, as Mr. Arnould, in his great work on Insurance, states, "introduced into England, probably about 1450 A. D., when the practice of marine insurance was being assumed into the hands of English merchants under a powerful feeling of jealous rivalry and opposition to the Lombard traders, who had long settled in London about the street still known by their name, and had secured for themselves a monopoly of the business of insurance and exchange. The form of this instrument, to any one not accustomed to use it, may well seem complex and cumbersome; yet long use, and a variety of decisions have now given such a degree of certainty, and the sanction of the legislature a second time bestowed upon it seems to impart to it such authority, that it is likely now to be retained among the chief instruments of English commerce" (1 Arnould, Marine Insurance, 6th ed., by Machlachlan, 231).

With respect to the first clause in the printed form of Lloyd's policy, containing the names of the assured or their agents, Mr. Lowndes states: "These words imply that some name must be inserted (this is necessary by *Stat. 28 Geo. 3, c. 56; 30 Vict., c. 23*); that it matters not whether it be the name of the principal or of his agent or broker; that the specific nature of the assured's interest in the thing insured need not be described; and that the policy may enure to the benefit of a future transferee of the interest. And each of these propositions has been in one way or another established by law (*Arnould, Ins., 234, 235; McKenzie vs. Whitworth, L. R., 10 Exch., 142; 1 Exch. D., 36*). An assignee of a policy may in certain cases sue in his own name on the policy. Stat. 31 & 32 Vict., c. 86, § 1; 36 & 37 Vict., c. 66, § 25, 26." (Lowndes, Marine Insurance, 47.)

It is, indeed, not denied, as we understand, by the learned and accomplished Chief Justice of the Supreme Judicial Court of Massachusetts, who delivered the opinion of the court in this case, that the agreed facts adduced by the Commonwealth to sustain the present indictment disclosed and established that the policy of insurance upon which the prosecution was based was an English and not a Massachusetts contract.

(*b.*) *It is equally certain that Mr. Nutting was not an agent for any purpose or object whatever of the British underwriters who accepted the risk and subscribed the policy, and that neither Johnson & Higgins nor Tyson and Company were agents of those underwriters.*

"Lloyd's underwriters," says Arnould, "now meet and carry on their business in subscription rooms over the Royal Exchange, consisting of two apartments, one in which the underwriters sit for the transaction of business with their employers, called the Public Room, and another called the Private Room, opening out of the first. The affairs of the subscribers to these rooms are managed by a committee called Lloyd's committee and presided over by a chairman. Lloyd's underwriters individually sign their names at the foot of the policy and opposite thereto the sum insured by each in figures, and also in words, with the date of so doing. This is technically called underwriting the policy for so much, and each thereby makes a separate contract in the terms of the instrument with the assured of the particular amount set opposite his name. The right of action is consequently against each separately and not against all jointly" (1 Arnould, Marine Insurance, 6th ed., 149, 150).

As Mr. Arnould states, "there may be agents to effect policies for the assured, and agents to subscribe them for the underwriters. *Lloyd's agents* have no other authority

than what they derive from the printed instructions under which they act" (1 Arnould, Marine Insurance, 190, 192).

(c.) *The receipt by Tyson and Company at the time of paying the premiums of a commission upon the insurance from the underwriters at Lloyd's for themselves and Johnson & Higgins, has no tendency to show that they were agents of the English underwriters.*

It is the invariable custom in England, as we may observe, for marine underwriters to allow a brokerage or commission of 5 per cent. on all insurances *even where they are effected by the assured himself without the intervention of a broker.* The writers on the law and practice of marine insurance state that this is and has been from time immemorial the custom of marine underwriters in England. (See 1 Arnould, Marine Insurance, 195; Hopkins, Manual of Marine Insurance, 210, 262, 346.) "From the premiums nominally agreed to be paid to the underwriter," Mr. Hopkins states, "two deductions are made before the money comes into his hands. One is a brokerage of 5 per cent. due to the agent effecting the insurance, but which it is to be remarked is paid equally, although the assured does his insurance personally, without that intervention. The other deduction is a discount, usually of 10 per cent. for immediate payment. It is also paid to whoever effects the insurance. An inconvenience attends this system of deduction. It is that the quoted premium must always be 15 per cent. above the rate equivalent to any risk, including underwriter's profit" (Hopkins, Manual of Marine Insurance, p. 210). This authority further explains the system: "Sup-

posing the transaction to be 'for cash'—which means, practically, a payment shortly after the completion of the policy, but not at the moment of effecting it—the assured gives his check to the underwriter, yet not for the full amount; the agreed premium being subject to two conditions—brokerage and discount. This brokerage represents the agent's emolument for effecting the insurance, and comes, or is *supposed* to come, out of the underwriter's pocket, but now it is allowed indifferently to broker or principal in doing an insurance, and is looked upon as a regular and constant deduction from the nominal premium paid. And this induced the expression that brokerage was '*supposed*' to be at underwriter's cost; for the underwriter in fixing the value of a risk, and forming his premium accordingly, has regard to the customary deductions and arranges such a *net* price as he considers equivalent to the risk." The nominal premium is thus 15 per cent. above the mathematical value of the risk.

The circumstance, therefore, that the Liverpool agents of Johnson & Higgins, Tyson and Company, received from the English underwriters a commission for themselves and Johnson & Higgins, has no bearing whatever upon any question as to whose agents they were, or as to whose agent Mr. Nutting, the plaintiff in error, was. It never was supposed in England that a broker to effect an insurance was constituted the agent of the underwriters by the custom under which he is allowed by them a commission on the insurance, which after all is only nominally paid by the insurers, and is really paid by the assured himself.

Upon general principles, it is clear, as decided by the court of appeals of New York, that "the fact that insurance

brokers receive *commissions* from the companies for such risks as they procure, does not constitute them agents for the companies" (Devens *vs.* Insurance Co., 83 N. Y., 171; Northrup *vs.* Peza, 60 N. Y. Supplement, 363). And as was also said by that learned court, "a mere insurance broker cannot be converted into an agent of the *insurance company* without evidence of some action on the part of the company, or of facts from which a general authority to represent it might be inferred" (Allen *vs.* Insurance Co., 123 N. Y., 6).

4. As it was undeniable under the evidence in this case that the alleged "unlawful" insurance on Mr. McKie's vessel was effected by a lawful and valid contract made on November 18, 1898, in London, and that the contract was an English and not a Massachusetts contract, the indictment was sought to be supported, on the part of the Commonwealth, by adducing the mandatory declaration at the end of *section 3* of the act of 1894 that "all contracts of insurance on *property in this Commonwealth* shall be *deemed to be made therein*," under which it was maintained by the prosecution that for the purposes of this criminal action, the court and jury were bound to deem and treat the contract of insurance referred to, contrary to the truth of the fact, and by a fiction of law, as a contract entered into not in *London*, but in *Boston*, and therefore within the territorial jurisdiction of Massachusetts.

This position was of course met by the objection, on the part of the defendant, that the mandatory and arbitrary declaration in *section 3* of the act of 1894, which attempts to make a contract entered into without the State of Massachusetts an act done within it, is in conflict with the Con-

stitution of the United States, and void, and the Superior Court at the close of the evidence was asked, by the defendant's request for rulings, to so adjudge (Defendant's Request for Rulings, *Fourth, Fifth, Sixth, supra;* Record, p. 7).

The court decided that the contention of the defendant in these requested rulings in respect to the mandatory provision at the end of the *third section* of the act of 1894, was entirely without merit, and accordingly refused to make the rulings.

The plaintiff in error also asked the Superior Court, at the close of the evidence, to make the following rulings:

"Seventh. That so much of *section 87* of chapter 522 of the Acts of 1894 of the Commonwealth of Massachusetts as purports to make illegal such acts as were done by the defendant in this case, is contrary to the provisions of the Constitution of the United States, and is unconstitutional and void.

"Eighth. That so much of *section 98* of chapter 522 of the Acts of 1894 of the Commonwealth of Massachusetts as purports to make illegal such acts as were done by the defendant in this case, is contrary to the provisions of the Constitution of the United States, and is unconstitutional and void.

"Eleventh. That so much of *chapter 522 of the Acts of 1894 of the Commonwealth of Massachusetts* as purports to make illegal such acts as were done by the defendant in this case, is contrary to the provisions of the fourteenth amendment of the Constitution of the United States, and is unconstitutional and void" (Defendant's Request for Rulings, Record, p. 7).

The Superior Court declined also to make these rulings, or any of them, and also refused to direct the jury to return a verdict of not guilty, or to decide that on all the evidence the jury would not be warranted in finding a verdict of guilty, or to decide that on all the evidence no unlawful acts

had been committed by the defendant, and the court finally charged the jury that they would be warranted in finding the defendant guilty (Defendant's Request for Rulings, Record, p. 6).

5. The Supreme Judicial Court of Massachusetts by its judgment overruling Mr. Nutting's exceptions, determined that the agreed facts sustained the indictment, and he was properly convicted, and that the provisions of those sections of the insurance act of 1894 under which the conviction was had, and the validity of which was drawn in question at the trial, were in conformity and not in conflict with the Constitution of the United States.

The opinion of the learned court would seem to indicate that this conclusion was reached not entirely without some misgivings as to the strength and firmness of the grounds upon which it rested, in view especially of what are spoken of in the opinion as the "intimations" of this court in the leading case of *Allgeyer vs. Louisiana*, to which the court expressed its willingness, however, to bow without criticism. The learned court thought that notwithstanding the right of Mr. McKie, if he chose, to apply from Boston to the London Lloyds for insurance, and while the legislature of the State could not impair his freedom to elect with whom he would contract, it might prohibit not only agents of the insurers, but also brokers, from soliciting or "*intermeddling*" in such insurance, and that what it said in its opinion went very little, if any, further than what is laid down in similar terms, as the court thought, in *Hooper vs. California* (155 U. S., 648), the authority of which is recognized in the subsequent Louisiana case.

The learned court, as we think, did not perceive that upon the facts of the transaction in the *Hooper* case, the defendant, while an agent of the assured, was an agent also of the New York Insurance Company to deliver the policy upon the assured's acceptance of it, and to receive from him the premium within the State of California, where the policy became for the first time a completed contract between the parties. The business of insurance in the case was in fact done within the borders of California by a foreign corporation not authorized to do anything in the State, in violation of the statute of the State. But in the present case no business whatever was done or intended to be done, and no contract was made or intended to be made, by the British individual underwriters, within the borders of the State of Massachusetts, and the object of the legislation of that State was to prohibit and prevent the underwriters at *Lloyd's* from contracting or doing business with the people of the State *at the London domicile of the British underwriters*, even to the extent of declaring that all contracts of insurance wherever made on property in the Commonwealth "shall be deemed to be made therein." That object was and is an unconstitutional one, which cannot be carried into effect by the penal instrumentalities intended to be employed for that purpose in the legislation under consideration as interpreted by the court below.

The learned court, in its opinion, finally said:

"What the legislature can do it has done by Statute 1894, c. 522. By *section 3:* 'It shall be unlawful * * * for any person as insurance agent or insurance broker, to make, negotiate, solicit, or in any manner aid in the transaction of insurance upon any property or interests in this Commonwealth, or with any resident thereof, except as authorized

by the act.' By *section 98:* 'Any person who shall act in any manner in the negotiation or transaction of unlawful insurance with a foreign company not admitted to do business in this Commonwealth, or who as principal or agent shall violate any provision of this act in regard to negotiating or effecting contracts of insurance,' is subject to a penalty. Whether the description of the insurance in the indictment as unlawful be rejected as surplusage, or whether the insurance be held to be unlawful within the meaning of the act, and because transacted through a broker acting unlawfully, an offense under the statute is set forth, and the defendant properly was convicted. It is unnecessary to consider whether the same result could be reached in another way. Possibly, for the reasons given above, it would be within the power of the legislature to enact that the insurance broker should be *regarded as the agent of the insurers*, whatever the agreement of the parties, and in that way reach the result that any contract made through him when he and the insured were here would be made in this State, and thus would be subject to our laws. Possibly it might be argued that such was the effect of our statute, although, if so, it fails to state it as clearly as could be wished. See sections 3 end, 87, 90. Exceptions overruled."

It would clearly seem that so long as the legislative power of a State is controlled by the Fourteenth Amendment of the Federal Constitution, a penal statute like this cannot finally be sustained as a valid law by the courts. It is repugnant to the American constitutional guaranties of liberty and property.

SECOND.

The scheme of the Massachusetts insurance act of 1894, so far as involved in this case, is in direct conflict with the Constitution of the United States, and particularly its Fourteenth Amendment, in that the object of the legislature was not merely to prevent the underwriters at Lloyd's from contracting or doing business within the territorial jurisdiction of Massachusetts, but to prevent the making of contracts of insurance between them and the citizens and people of the Commonwealth at the domicile of the English underwriters at the Royal Exchange in London.

1. The act, so far as we are concerned with it in this case, proceeds upon the distinctly erroneous theory that a State of this Union has the right and power under the Constitution of the United States to proscribe, prohibit and prevent by criminal enactments and penalties all contracts for the insurance of property in the State by foreign corporations or natural persons not admitted under the act to do insurance business in the State, whether such contracts are effected within or are made and to be performed without the territorial jurisdiction of the Commonwealth. Since the great judgment delivered for this court by Mr. Justice Peckham in the leading case of *Allgeyer vs. Louisiana* (165 U. S., 578), decided in 1896, it has been regarded as the settled law of the land that it is the absolute constitutional right of a citizen or resident of a State to enter into contracts made outside of the State with foreign underwriters not admitted to do business in the State for the insurance of his property in the territory of the State, and to effectuate such contracts by acts done within the limits of the State, any prohibition of a State

statute to the contrary notwithstanding. The court in that case unanimously said:

"In the privilege of pursuing an ordinary calling or trade and of acquiring, holding and selling property must be embraced the right to make all proper contracts in relation thereto, and although it may be conceded that this right to contract in relation to persons or property or to do business within the jurisdiction of the State may be regulated and sometimes prohibited when the contracts or business conflict with the policy of the State as contained in its statutes, yet the power does not and cannot extend to prohibiting a citizen from making contracts of the nature involved in this case outside of the limits and jurisdiction of the State, and which are also to be performed outside of such jurisdiction; nor can the State legally prohibit its citizens from doing such an act as writing this letter of notification, even though the property which is the subject of the insurance may at the time when such insurance attaches be within the limits of the State. The mere fact that a citizen may be within the limits of a particular State does not prevent his making a contract outside of its limits, while he himself remains within it (*Milliken vs. Pratt*, 125 Mass., 374; *Tilden vs. Blair*, 21 Wall., 241). The contract in this case was thus made. It was a valid contract made outside of the State, to be performed outside of the State, although the subject was property temporarily within the State."

And the learned court added:

"The Atlantic Mutual Insurance Company of New York has done no business of insurance within the State of Louisiana, and has not subjected itself to any provisions of the statute in question. It had the right to enter into a contract in New York with citizens of Louisiana for the purpose of insuring the property of its citizens, even if that property were in the State of Louisiana, and correlatively the citizens of Louisiana had the right without the State of entering into contracts with an insurance company for the same purpose. *Any act of the State legislature which should prevent the entering into such a contract*, or the mailing within the State of such a notification as is mentioned in this case, is an improper interference with the *conduct* of its citizen, although

residing in Louisiana, in his right to contract and to carry out the terms of a contract validly entered into outside and beyond the jurisdiction of the State."

The court observed:

"We are not alluding to *acts done within the State by an insurance company or its agents doing business therein which are in violation of the State statutes. Such acts come within the principle of the Hooper case, and would be controlled by it.* When we speak of the liberty to contract for insurance or to do an act to effectuate such a contract already existing, we refer to and have in mind the facts of this case, where the contract was made outside of the State, and as such was a valid and proper contract. The act done within the limits of the State under the circumstances of this case and for the purpose therein mentioned, we hold a proper act, one which the defendants were at liberty to perform and which the State legislature had no right to prevent, at least, with reference to the Federal Constitution. To deprive the citizen of such a right as herein described without due process of law is illegal. Such a statute as this in question is not *due process of law*, because it prohibits an act which under the Federal Constitution the defendants had a right to perform."

It was thus adjudged that the Louisiana statute under which Mr. Allgeyer had been convicted of a crime against the State was a violation of the Federal Constitution, and no justification for the judgment against him.

2. As we have seen, by *section 3* of the Massachusetts Insurance Act, it is declared to be "unlawful" for any insurance company, unless and except as authorized under the provisions of the act, to make any contract of insurance (1) "*upon or concerning any property or interests or lives in the Commonwealth*," or (2) "*with any resident thereof*," and it is further declared that "all contracts of insurance on prop-

erty, lives or interests *in this Commonwealth* shall be *deemed to be made therein*," wherever as matter of fact and law such contracts are actually made and actually to be performed.

The prohibition of the act purports to apply as well to *exterritorial* contracts by citizens of the State with foreign insurance companies not authorized to do business in the State, as to the *infraterritorial* contracts by citizens of the State with such companies, and "any person" acting as "principal" or "agent," in the negotiation or transaction of such contracts of insurance, whether he so acts *without* or *within* the territorial jurisdiction of the Commonwealth, is subject to the penalties of the statute. This court, however, pointed out with great clearness in *Allgeyer vs. Louisiana*, as well as in *Hooper vs. California*, the constitutional distinction in respect to the rights of citizens of a State between contracts of insurance with such companies made *within* and those made *without* the territorial jurisdiction of the State, and the disregard of that distinction and the consequences of it by the legislature of Massachusetts necessarily affected its enactment with the vice of inherent *unconstitutionality*.

3. The enactment, it may be observed, is peculiarly repugnant to the Constitution of the United States, in its application to the facts of this case, in view of the provision in the 86 88th section of the statute, by which only individual underwriters *who are citizens of the United States* may be authorized to transact marine insurance business in the State upon Lloyd's plan, under the conditions imposed upon "insurance companies of other of the United States."

The individual underwriters at Lloyd's do no business in

Massachusetts, and have not entered the State through their representatives or agents to do business there.

The Massachusetts statute proscribes and puts under its ban the greatest body of marine insurers of the greatest commercial country of the world, whose history antedates the sailing of the *Mayflower*, and in the same breath in which it denies to them the privilege upon any conditions of doing business, as underwriters, in the State, the act purports to deprive the ship-owners and merchants of the Commonwealth of their natural and common law and constitutional right to insure their vessels and merchandise at Lloyd's, by contracts made and to be performed at the Royal Exchange in London, and to punish them, as well as their agents and attorneys, in and out of the State, if they do so, or attempt to do so.

The citizens and people of the Commonwealth and their just constitutional rights and interests are between the upper and nether stones of this legislation, which is manifestly based upon a principle of paternalism in government far beyond the reach and support of any police or other legislative power of the State under the Constitution of the United States.

It seems to be clear under the provisions of the act that if Mr. McKie, the assured in this case, had gone to New York and employed Johnson & Higgins to secure insurance on his property at Lloyd's in London, Johnson & Higgins could have been indicted under the statute and punished if they had been found in Massachusetts. As if to remove doubt upon the subject, *section 3* declares that all contracts of insurance on property, lives or interests in the Commonwealth, *shall be deemed to be made therein.*

*

4. Since the Fourteenth Amendment a citizen of a State is a citizen of the United States residing in the State, and in one view of the effect of the great Amendment the rights, privileges and immunities which belong to him, as a free man and a free citizen, now belong to him as a citizen of the United States, and are not dependent upon his citizenship of the State; but however that may be it is clear that the State of Massachusetts cannot, *directly or indirectly, by penal legislation, deprive the citizens of the United States residing in her territory of the right and privilege of contracting in London with the natural persons who underwrite marine policies at Lloyd's for the insurance of their maritime or other commercial property in the State, or of any essential or necessary and proper incident thereof,* any more than she may prohibit and prevent them from buying lands or ships or merchandise in Great Britain under the sanction of its laws.

5. The California statute involved in the case of *Hooper vs. California* (155 U. S., 648), as we have said, is a very different statute. It provides only for the punishment of "every person who *in this State procures* or agrees *to procure* any insurance for a resident of the State, from any insurance company not incorporated under the laws of the State, unless such company or its agent has filed the bond required by the laws of this State relative to insurance." The California statute does not purport to prohibit the citizens of the State from making contracts with unadmitted foreign underwriters outside of the State, for the insurance of their property in the State. Such contracts are not prohibited or attempted to be by the law of California. The statute in that respect is conformable to the Constitution of the United

States. The procuring of the contract is not forbidden, except when done within the territory and jurisdiction of the State. The statute of Massachusetts, however, purports to operate on the contracts themselves effected and consummated outside of the jurisdiction of the State, and is thus in contravention of the Constitution of the United States.

The contract of insurance in this *Hooper* case was procured by the defendant within the State, and was *consummated* and became binding for the first time as a completed contract within the territory and jurisdiction of California. The policy was procured by Hooper, it was accepted by and delivered to the assured, and the premium was paid to Hooper by the assured, all within the territorial jurisdiction of California. The foreign company was in fact doing business through an agent in the State in violation of its laws, as understood by this court when it said in the *Allgeyer* case (*supra*), "we are not alluding to acts done within the State by an insurance company or its agents doing business therein which are in violation of the State statutes. *Such contracts come within the principle of the Hooper case and would be controlled by it.*" Evidently, the *Hooper* case is no authority for the judgment pronounced in this case by the Supreme Judicial Court of Massachusetts, and the law of the case was, as we think, misapprehended by that learned court.

7. The case of *Pierce vs. The People* (106 Ill., 1), cited in the opinion below, likewise affords no support for the judgment in this case. The Illinois insurance act of 1869 provided a penalty against the agent of a foreign insurance company for acting for it without a certificate of authority from the auditor, showing a compliance with the conditions required by

the law for its doing business, and made a person aiding in the transaction of the insurance business of such company in the State subject to the penalty. Pierce was prosecuted for acting as the agent of a foreign company, without authority of law, by procuring and delivering a policy of the company in Illinois to a resident of the State, who paid Pierce the premium, part of which he retained as his commission, the balance being remitted to the home office. The defense as set up, that the policy stipulated that Pierce should be "deemed" the agent of the assured, and not of the company, was disregarded as a subterfuge by the court, which found that the facts showed conclusively that he acted in the interest and as the agent of the insurance company in the transaction in the State in violation of the law. The opinion in the case is taken up almost entirely with combatting the proposition that the defendant was not the agent of the assured, the character attempted to be given him by the company. He was, in fact, the agent of the company, notwithstanding the pretense to the contrary, and the contract was in fact effected through him, in Illinois, where, as stated, the premium was paid on the delivery of the policy to the assured. The act of the contracting agent of the company which was punished was that done in Illinois, and although the intention of the statute was to prevent any contract being made with an unauthorized insurance company by citizens of the State anywhere, its preventive measures were confined to contracts made within the limits of the State, and did not purport to extend to contracts made out of its jurisdiction.

8. The case of *Lamb vs. Bowser* (7 Bissell, 315) was an action on a premium note given to an Illinois insurance company upon an application to the agent of the company in Indiana for insurance on property in that State. The agent forwarded the application and the note to the company in Illinois, and caused a policy of insurance to be delivered to the defendant in Indiana; all of which was done by the company and the agent without having complied with the statute of Indiana respecting foreign corporations and their agents doing business in that State. The defense to the premium note was that the contract was unlawful under the Indiana statute providing penalties against any person who should make or cause to be made any contract or transact any business on account of a foreign corporation which had not complied with the State law. It was decided (1) that the contract was made in Illinois and was an Illinois contract, and therefore not in violation of the Indiana statute; (2) that the contract, being valid in Illinois, was good in Indiana, and everywhere, and might be enforced in Indiana. And the court said: "It is not competent for the legislature of Indiana to declare that the citizens of this State shall not be allowed to make such contracts as they please *out of the State* for the insurance of their property within or without the State." The Massachusets act is based upon the opposite and unconstitutional theory that a State *may* prohibit its citizens from insuring their property by contracts made out of the State.

THIRD.

The primary proposition of the argument on the part of the plaintiff in error is that Tyson and Company, Johnson & Higgins, and Mr. Nutting, the plaintiff in error, were not and cannot be deemed to have been the agents for any purpose or object of the underwriters at Lloyd's who subscribed the policy on Mr. McKie's vessel, and that the contract contained in the policy was wholly an English and not in any part a Massachusetts contract.

1. It is one of the agreed facts that "neither Tyson & Company nor Johnson & Higgins, nor Charles H. Nutting were agents for the London Lloyds, and the term 'broker' is not to be interpreted as meaning that they were such agents, except so far as the facts herein stated constitute them such agents;" but this stipulation was unnecessary, as it cannot be said, and, indeed, it is not suggested in the opinion of the Supreme Judicial Court of Massachusetts, that upon the facts stated Mr. Nutting or the other persons named can be regarded as the agent or the agents of the British underwriters who subscribed Mr. McKie's policy.

The learned court below did suggest that possibly the legislature might have power to enact a *fiction*, and possibly it had done so, by which "the insurance broker should be *regarded* as the agent of the *insurers*, whatever the agreement of the parties, and in that way reach the *result* that any contract made through him when he and the insured were here would be made *in this State and thus subject to our laws.*" But we are not now dealing with the question of the power of the legislature to resort to a fiction of that kind as a means of preventing by criminal punishment the citizens

of the State from getting their marine insurance, if they want to, in a foreign country, instead of in Massachusetts, although we may say here that we deny the power of a State legislature by enacting such a fiction, as suggested, to subject any one to its penal laws in respect to a lawful contract of insurance made in England by the London Lloyds in favor of a citizen of the State. Such legislation would only be an attempted exercise of that kind of purely arbitrary power by the State which it was the very object of the Fourteenth Amendment to eliminate from our system of constitutional government.

2. There can be no question that Tyson and Company of Liverpool, who procured the insurance in England, were agents of McKie, and were not agents for any purpose of the British underwriters. They were requested to get insurance in England for McKie by Johnson & Higgins of New York, under their employment by McKie to procure the desired insurance where they deemed best, and that employment was obtained for Johnson & Higgins by Mr. Nutting, the plaintiff in error, as their agent in Boston. All the persons named were the agents of Mr. McKie. They cannot be regarded as agents of the British underwriters.

The circumstance that Tyson and Company received a commission from the Lloyds, and shared it with Johnson & Higgins, does not affect the question, as already shown, as to whose agents they were or whose agent Mr. Nutting was. It is nothing uncommon for the owner of property to employ an agent to sell it for a certain price, telling him at the same time that he must get his *commission* out of the purchaser.

That does not make him agent for anybody except the seller. Here it was left to Tyson and Company to select the British underwriters with whom the insurance should be placed, and the London Lloyds paid the *commission* practically *for getting the preference*. By accepting part of it, Johnson & Higgins did not become the *agents* of the underwriters who allowed it, and whom they never saw. It is quite usual, too, for insurers, where the assured applies for the insurance in person, to allow the customary commission to the assured. If McKie had made personal application for the policy and the London Lloyds had deducted 5 per cent. from the premium, as charged, as a commission, we suppose that fact would not have made him *their* agent.

3. The policy became a completed and executed contract in England between the British underwriters and the assured the moment it was received by Tyson and Company and the premiums were paid by them in Liverpool. The contract was thus consummated and completed long before the *policy* was handed over to McKie in Boston. If the property had been lost by fire the day after the policy was received by Tyson and Company, McKie could have recovered in England upon the contract though it had never left Liverpool. When the policy was transmitted, through Johnson & Higgins, and Mr. Nutting, to McKie in Boston, it was so transmitted only as the paper evidence of a contract long since consummated and completed in England, and for the purpose of safe keeping by its owner. The contract was wholly an English contract. If McKie afterwards in Massachusetts repaid the advance of the premium by Tyson and Company, it had nothing to do with the *place where the contract was made.*

The case is precisely the same as though *McKie* had been present and did the acts himself in Liverpool. He was, indeed, constructively there in the person of Tyson and Company, his agents, under a familiar principle of law (Bailey *vs.* Hope Insurance Co., 56 Maine, 474; Milliken *vs.* Pratt, 125 Mass., 374; McIntyre *vs.* Parks, 3 Metcalf, 207). When the policy was received and the premiums were paid by the English agents, the acts had the same effect as they would have had if McKie himself, instead of Tyson and Company, had personally performed them in Liverpool, and had afterwards put the policy in his pocket and brought it to Boston on the next steamer.

The Supreme Judicial Court of Massachusetts, in *Milliken vs. Pratt* (125 Mass., 374, 376), said:

"If the contract is completed in another State, it makes no difference in principle whether the citizen of this State goes in person, or sends an agent, or writes a letter, across the boundary line between the two States. As was said by Lord Lyndhurst: 'If I, residing in England, send my agent down to Scotland, and he makes contracts for me there, it is the same as if I myself went there and made them' (*Pattison vs. Mills*, 1 Dow & Cl., pp. 342, 363). So, if a person residing in this State sends and transmits, either by a messenger or through the post-office, to a person in another State, a written contract, which requires no special forms or solemnities in its execution, and no signature of the person to whom it is addressed, and is assented to and acted on by him there, the contract is made there, just as if the writer personally took the executed contract into the other State, or wrote or signed it there; and it is no objection to the maintenance of an action thereon here, that such a contract is prohibited by the law of this Commonwealth."

4. As further authority for what has been said it is unnecessary to go beyond the well-considered Massachusetts case of *Commonwealth Mutual Fire Insurance Company vs. William*

Knabe and Company Manufacturing Company (171 Mass., 265), decided in 1898 (of course after *Allgeyer vs. Louisiana*, decided in 1896). In that case, the plaintiff, a Massachusetts mutual company, sought to recover from the defendant, a manufacturing company of Maryland, certain assessments as a policyholder in the plaintiff corporation. The Massachusetts company was not permitted by the laws of Maryland to do business in that State, but it had nevertheless insured the property of the defendant in Baltimore by certain policies which the plaintiff claimed were *Massachusetts contracts*, made through certain *insurance brokers* in New York, who the plaintiff said were the agents of the defendant, or were not the agents of the plaintiff. It was admitted that if the policies were *Maryland contracts*, the assessments could not be recovered from the Maryland defendant corporation. The Supreme Judicial Court of Massachusetts, in a very concise and luminous opinion by Mr. Justice Morton, held that the insurance brokers through whom the policies were effected were the agents only of the defendant, and that the contracts contained in the policies were complete the moment the policies were put in the mail at Boston for transmission to the New York insurance brokers who had sent the applications for the insurance to the plaintiff.

It appeared that the defendant had requested Glover and Company, insurance brokers of New York, to get insurance for it on its Maryland property, and Glover and Company had requested Tate and Cornwall, other insurance brokers in New York, to obtain such insurance in the Massachusetts Company. Tate and Cornwall sent an application for the desired insurance to Blake and Taylor, who were the managers of the company in Boston. The policies were mailed

by the company to Tate and Cornwall, in New York, and they delivered them to Glover and Company, who mailed them to the defendant at Baltimore. Tate and Company, the New York brokers, were paid by Blake and Taylor a part of the commission allowed them by the insurance company, which, of course, in effect, was paid by the company itself to the New York insurance brokers. Nevertheless, it was held that the New York insurance brokers were not to be deemed the agents in any sense of the insurance company.

MORTON, *J.*, said:

"There is nothing to show that Tate and Cornwall were the authorized agents of the plaintiff. They are described as insurance brokers. They were requested by Glover and Company to obtain insurance on the property described in the policies. Glover and Company also requested them to obtain the insurance in the plaintiff company. In forwarding the application, they clearly acted for Glover and Company, who in turn acted for the defendant. They did not solicit the insurance for the plaintiff from Glover and Company, but Glover and Company requested them to procure insurance in the plaintiff company for the defendant. It seems to us plain that Tate and Cornwall must be regarded *as the agents of the defendant*. The fact that there were open accounts between Tate and Cornwall and Blake and Company (the managers of the plaintiff company), and that the premiums were charged to the former, who were paid by the latter out of the commissions which they were allowed by the plaintiff, has no tendency to show that they were its agents, nor has the fact that the checks received by Tate and Cornwall from Glover and Company, and sent by them to Blake and Company, were payable to the plaintiff's order, any such tendency. The plaintiff is a Massachusetts company. The offers contained in the applications were received and accepted by it in Boston. The policies were made and signed there. The contracts contained in the policies were to be performed there. When the policies were

mailed at Boston to the defendant's agents at New York, if not before, the contracts were complete, and must be regarded, we think, as Massachusetts contracts (Brauer *vs.* Shaw, 168 Mass., 198; Seamans *vs.* Knapp-Stout Co., 89 Wis., 171; Western *vs.* Genesee Insurance Co., 2 Kernan, 258; Bailey *vs.* Hope Insurance Co., 56 Maine, 474; Hartford Insurance Co. *vs.* Lasher Stocking Co., 66 Vt., 439)."

By the law of Massachusetts, therefore, the persons who acted under McKie's employment cannot be regarded as agents of the British underwriters, and the contract, which is the basis of this criminal prosecution against Mr. Nutting, was an English, and not a Massachusetts, contract, and the whole business of insurance involved was transacted by the British underwriters within British jurisdiction, and not within the State of Massachusetts.

The Pennsylvania case of *Western Massachusetts Mutual Fire Ins. Co. vs. Storage Co.* (6 Pa. Superior Court, 288), also decided in 1898, was a suit by the receiver of the corporation plaintiff in the Massachusetts case, above cited, to recover assessments levied for losses during the life of certain policies of the company on property in Pennsylvania issued and delivered in Massachusetts, and in which the defense was that the transaction was in violation of the law of Pennsylvania. The Pennsylvania court likewise held that the policies in that case were Massachusetts contracts, without knowledge, perhaps, of the prior Massachusetts decision, and that the prohibitive legislation of Pennsylvania could not apply to "companies who have never come within the boundaries of the Commonwealth, *who have neither office nor agent here and who have but issued and delivered policies in another State in a particular instance to a citizen of Pennsylvania.*"

PORTER, *J.*, said:

"The issuance and delivery of the policies in Massachusetts made the contract a Massachusetts contract to be governed by the law of Massachusetts, *free from taint of illegality by reason of the existence of penal or prohibitive legislation in Pennsylvania.* To hold otherwise would be to give to these acts *extraterritorial* effect, and to deprive the citizen of his constitutional right to make such contracts as he may desire beyond the boundaries of Pennsylvania (*Allgeyer vs. Louisiana*, 165 U. S., 578)."

5. The contract in the policy in this case is an English contract under the decision of this court in *Society vs. Clements* (140 U. S., 226–232), and under the general pertinent authorities (May on Ins., § 66; N. W. M. L. Ins. Co. *vs.* Elliott, 5 Fed. R., 225; Providence S. L. A. *vs.* Hadley, 102 Fed. R., 856; State *vs.* Williams, 46 L. A., 922; Hyde *vs.* Goodnow, 3 Comst. (N. Y.), 266).

The place of performance will ordinarily be deemed the place of contract unless the parties intended otherwise (London Assurance *vs.* Companhia de Moagens, 167 U. S., 149, 160, 161; Coghlan *vs.* S. C. R. R. Co., 142 U. S., 101; Hall *vs.* Cordell, 142 U. S., 116; Dicey, Confl. Laws, 568, 570; Story, Confl. Laws, § 280).

6. The contract was to be performed in England, and the negotiation and procurement of it, from inception to completion, from *alpha* to *omega*, took place not at Boston, but at London and Liverpool, and it was all between the London Lloyds of the one part, and McKie of the other part, acting through his agents, Tyson and Company.

FOURTH.

The object of the Fourteenth Amendment of the Constitution of the United States is to protect the citizens of the United States and the people of the States against all such arbitrary State legislation, under the guise of the police power, as that enforced against the plaintiff in error in this case.

1. The great purpose of the framers of the Amendment was to place the citizens and people of the United States forever out of the reach of the despotic or arbitrary action of State legislatures. Whatever a State may do under any power of legislation, call it the police power or by any other name, it cannot abridge the privileges and immunities of citizens of the United States, or arbitrarily interfere with the individual liberty or property of the people of the States, or any essential *incident* to the enjoyment thereof.

The late Dr. Francis Wharton, in his *Commentaries on American Law*, has shown how the great Amendment was essential to perfect our political system, and that it is founded upon the doctrine that the sovereignty of the States is placed, not in their *legislatures*, but in the *people*. That eminent jurist, referring to the traditionary American distrust of legislation, observes:

"It is not strange that this distrust of legislation should find expression in numerous restrictions in the Constitution on the powers both of States and of General Government, and that ultimately it should be provided by an amendment that all powers not expressly given to the General Government should remain in the States or in the people thereof. This was not a *doctrinaire* speculation. It was not a fiction of statesmen desirous of establishing a balance of power. It was the voice of necessity and of right. It was what was

exacted by the traditions of the past, the conditions of the present, and the conscience of both. The final expression of this distrust of legislation is to be found in the Fourteenth Amendment by which the power of State legislatures is so far curtailed as to preclude them from passing any laws taking private property without due process of law, or making any discrimination as to the enjoyment of civil rights. Even had there been no civil war, and no race, heretofore enslaved, to be liberated, this provision would have been *essential to perfect our political system* so as to establish the principle that there shall be no interference by legislation, either State or Federal, with either private property or equality of personal rights. * * *

"By the first group of amendments, embracing the first eleven, the people of the States, as well as the States themselves, are protected from undue aggressions of the Federal Government. *But this was not enough.* It became evident that the people of the States were in danger at least as much from the aggressions of their own legislatures as from the usurpations of Congress. No one can study the statute books of our States without seeing to how vast and pernicious an extent the private rights of individuals have been interfered with by State legislation; and no one who observes the way in which State legislatures are chosen, the materials of which they are often composed, and the temptations to which they are generally subjected, can avoid feeling that they are not fit depositaries of the absolute power claimed for such bodies, and that they should at least be placed under checks as stringent as those placed on Congress by the first group of amendments. * * *

"This clause, as has been already observed, cures what was previously the great defect of our system. It destroys the power which had been assumed by the State legislatures of interfering with private business, and of doing by law that which can far better be done by individual enterprise. And it goes as far as a constitutional limitation can go in establishing the principle, heretofore noticed as one of the first rules of liberal civilization, that government should not exercise functions which can be as well exercised by the people by themselves; that which industry and enterprise can fairly win, arbitrary legislation is not to be permitted to take away. The State rights school of expositors erred in holding that State sovereignty is vested, not in the people of the States,

while remaining in the Union, but in the legislative representatives of the States assembled in constitutional conventions, or in legislatures under the limitation of the State constitutions. The error was great and its consequences have been serious. It led to the assumption (1) that constitutional conventions are absolute, and (2) that State legislatures are absolute, subject only to the limitations of the State constitutions. Nor has this error, on its municipal side, been confined to those who claimed the right of secession. Courts which have been most strenuous in rejecting that claim have been equally strenuous in holding that within the orbit of State power, State legislatures, unless restrained by State constitutional limitations, are absolute. * * * The sovereignty of the States is not in any way impaired by this amendment. But this sovereignty is placed, not in the *legislature*, but in the *people*. The people are hereby protected from the encroachments, not of the Federal Government, but of their legislatures. These legislatures cannot now deprive any persons of their rights without due process of law. There can be no unfair discrimination between persons." (Wharton, Commentaries on American Law, §§ 365, 594, 595.)

As finely observed by Mr. Lawrence Lowell in his essay on the *Limits of Sovereignty:* "The doctrine that sovereign power is unlimited, in the first place, leads almost unavoidably to the opinion that it is proper to use that power without restraint, because the great mass of the people cannot distinguish between the legal and the moral aspects of politics, and are very apt to conclude that if the State has a legal right to do a certain act, it is under no moral obligation to refrain from doing it. There is a danger, in the second place, that the people will confound sovereignty with legislative power, and attribute the former to any body which possesses the latter. If they are taught that the power of the sovereign is absolute, they are likely to believe that the legislature ought to, and, in fact, does, have

authority to pass laws without restraint,—a notion which would undermine the very foundations of our whole political system." (A. Lawrence Lowell, Essays on Government, pp. 192, 193.)

2. The legislation in the Massachusetts insurance act, so far as we are here concerned with it, is an apt illustration of the political phenomena out of which the Fourteenth Amendment in part grew, as referred to by Dr. Wharton. It proceeds upon the idea that the power of the legislature is absolute and unlimited over people and property in the State in respect to the subject of insurance—a theory repugnant to the Amendment, which is founded on the doctrine of the natural rights of man. The object of that penal legislation being not merely to prevent the London Lloyds from doing business as insurers in the limits of the State, but to prevent business intercourse for insurance purposes between the people of the Commonwealth and the British underwriters, the enactment as framed is *ultra vires* the legislature of Massachusetts, and no man's liberty, in the case of such a contract of insurance as that in question here, can be lawfully taken away from him under it.

The penalties of the act purport to be directed against what it calls "*unlawful insurance*," including in that designation contracts made and performable outside of the State with foreign insurance companies not admitted to do business in the State,—contracts over which the State possesses no jurisdiction or power under the Constitution of the United States, and cannot legally prevent or prohibit.

The act, in fact, does not purport to be an exercise of the police power of the legislature to prohibit foreign insurance

companies from doing business within the limits of the Commonwealth.

3. Granted that the legislature possesses the power to prescribe the conditions upon which alone the natural persons who underwrite marine policies at Lloyd's shall exist to do business in the State, and to prohibit the people of the Commonwealth from contracting with them in the territory and jurisdiction of the State, the legislature cannot make it a crime for any person to act as the agent or servant of a citizen of the United States in respect to a contract of insurance with those underwriters which is not effected with them in the limits of the State, but which is effected wholly and entirely by the assured, or through his agents, in England. Criminal legislation, designed to prevent the making of such a foreign contract with those individual underwriters, cannot be deemed an appropriate means of carrying into effect any lawful power of the legislature, under the Federal Constitution, over the transactions of the people of the State with them, but, on the contrary, is outside and beyond the scope of any such power, and is purely arbitrary legislation under the Fourteenth Amendment. Under the judgment below, the plaintiff in error is simply the victim of penal legislation which transcends in its plan and purpose the limits of the legislative power of the State under the great Amendment.

4. The acts performed by the plaintiff in error, as the agent of Johnson & Higgins of New York, and Mr. McKie, within the territorial jurisdiction of the State, related solely to insurance desired and intended to be pro-

cured by McKie out of the territory and jurisdiction of the State, and to the insurance obtained by him which was lawfully effected in England and not in the Commonwealth of Massachusetts. It was not in the power of the jurisdiction of the legislature to punish the acts of the plaintiff in error as a crime against the Commonwealth, and the enactment as enforced against him affords no justification, as we submit, for the judgment rendered in this case.

FIFTH.

The legislative mandate in section 3 of the Massachusetts Act that "all contracts of insurance on property, lives or interests in this Commonwealth shall be deemed to be made therein," as applied in this criminal case to the English contract which was the basis of the prosecution and conviction of Mr. Nutting, is void as repugnant to the Constitution of the United States.

1. The fifth and sixth requests of the plaintiff in error for rulings by the Superior Court were to the effect that he could not be held criminally liable for an act done without the State, and that so much of section 3 of the act of 1894 as provides that all contracts of insurance on property, lives or interests in the Commonwealth of Massachusetts shall be deemed to be made therein, and as attempts to make a contract entered into without the Commonwealth an act done within it, is repugnant to the Constitution of the United States and void (Defendant's Request for Rulings, *supra;* Record, p. 7).

It is maintained that the trial court should have made the rulings as requested, and that the exceptions of the plaintiff in error should have been sustained and allowed by the Supreme Judicial Court of the State.

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2. It was contended, on the part of the Commonwealth, in support of the decision of the trial court, that the provision in section 3 of the act of 1894 referred to, was intended to establish a rule of evidence for the enforcement of the object of the statute, and to prevent evasion of its provisions by the people of the State, and that as such the enactment was within the constitutional power of the legislature, but it would seem to have been forgotten that this court had conclusively adjudged that the citizens of the State as free men have the inviolable constitutional right to contract with whom they please outside of the State for the insurance of their commercial property in the State, and that the legislature cannot lawfully interfere with their exercise of that right. The legislature cannot, therefore, by a so-called rule of evidence or otherwise assume to prevent a citizen or any free man from evading, if he be so minded, any provision of this legislation designed to limit or interfere with his contractual liberty under the Constitution. There is no evasion, however, of such legislation by a citizen who exercises that liberty. The Constitution simply removes it as an unlawful obstruction in his path. So that if the object of the provision in the 3d section of the act of 1894 referred to, was to prevent the free people of the Commonwealth from exercising their contractual liberty in respect to the insurance of their property in the State, such object was an unconstitutional one, and the enactment was beyond the competent power of the legislature.

3. The enactment is, of course, not embraced by the authority of the legislature to provide rules of evidence in civil cases; nor is it supported by the numerous decisions of the

State courts on the subject of the legislative control over evidence, in that class of cases, cited in the argument below.

Judge Cooley, in his *Constitutional Limitations*, after examining the class of cases relied on by the Commonwealth, says: "But there are fixed bounds to the power of the legislature over this subject (of evidence) which cannot be exceeded. As to what shall be evidence, and which party shall assume the burden of proof in *civil cases*, its authority is practically unrestricted, so long as its regulations are impartial and uniform; but it has no power to establish rules which, under the pretense of regulating the presentation of evidence, go so far as altogether to preclude a party from exhibiting his rights. Except in those cases which fall within the familiar doctrine of estoppel at the common law, or other cases resting upon the like reasons, it would not, we apprehend, be in the power of the legislature to declare that a particular item of evidence should preclude a party from establishing his rights in opposition to it. In judicial investigations, the law of the land requires an opportunity for a trial; and there can be no trial if only one party is suffered to produce his proofs. * * * A statute, therefore, which should make a tax deed conclusive evidence of a complete title, and preclude the owner of the original title from showing its invalidity, would be void, because being not a law regulating evidence, but an unconstitutional confiscation of property" (Constitutional Limitations, 6th ed., pp. 452, 453).

Nor is the constitutionality of this enactment sustained by the ground upon which it has been held in several States that in criminal prosecutions the legislature may with some limitations enact that when certain facts have been proved they shall be *prima facie* evidence of the main fact in ques-

tion. As said by Mr. Justice Peckham for the Court of Appeals of New York in *People vs. Cannon* (139 N. Y., 43), "the limitations are that the fact upon which the presumption is to rest must have some fair relation to or natural connection with the main fact." But with regard even to such legislation it was said, and undoubtedly with great force, by Mr. Justice Thomas, dissenting in the case of *Commonwealth vs. Williams* (6 Gray, 11), that "if not strictly an exercise by the legislature of judicial power, within the prohibition of article 30 of the Declaration of Rights, it is the assertion of a power which, carried into full exercise, would take from one department of the judicial tribunal, the jury, its substantial, effective power."

4. The provision of the third section of the Massachusetts act, under consideration, in its application to this criminal action, is undoubtedly in effect nothing but a legislative decree directing the judicial courts of the State to conclusively "deem" the lawful English contract of insurance upon Mr. McKie's vessel in Boston an unlawful Massachusetts contract, contrary to the truth of the transaction under the law of the land, and upon that ground to convict the plaintiff in error of a crime against the State. No such legislative act can stand the test of constitutional argument. This enactment is purely arbitrary legislation, in violation of the provisions of the Fourteenth Amendment in its application to the present case and the rights of the plaintiff in error.

The learned court below would seem to suggest that possibly the intended effect of this enactment, in connection with other provisions of the act of 1894, is to constitute the plaintiff in error the agent of the British underwriters in the

State, and to deprive the contract of insurance in question of its actual British status and character, and in that way to subject the contract to the penal laws of the State for the purpose of punishing Mr. Nutting for negotiating it within the State. And, possibly, that may have been the intended scheme or effect of the provisions of the act referred to, but we are unable to understand how in that view the act can be supposed to be a constitutional exercise of the power of the legislature under the Fourteenth Amendment.

The legislature could not decide for the courts of the State that Mr. Nutting was the agent of the foreign underwriters in the State when, under the *law of the land*, he was *not* their agent, or that the contract of insurance in question was completed in the State when, under the *law of the land*, it was completed in England, or that the insurance was negotiated and transacted in Boston when, under the *law of the land*, it was made and consummated in Liverpool. The enactment as here applied is a plain usurpation of power, and of judicial power, by the legislature in violation of the rights secured to Mr. Nutting by the Fourteenth Amendment. It is an attempt to confiscate the liberty of the citizen by a legislative mandate in violation as well, we should suppose, of the constitution of Massachusetts, by which in the Government of the Commonwealth the legislative department can never exercise the judicial powers, "*to the end that it may be a government of laws and not of men*," as of the Fourteenth Amendment, which disables a State from depriving any person of his liberty without due process of law, or denying to any person within its jurisdiction the equal protection of the laws. The fundamental principle of our system of constitu-

tional government which ordains the separation of the legislative and judicial powers of the State was intended to be safeguarded for the protection of liberty and property by the great Amendment. The Amendment may be said to affirm the celebrated declaration of Mr. Webster in the *Dartmouth College case* (4 Wheaton, 518), when he said as to the power of the legislature:

"It shall not judge, by *act*. It shall not decide, by *act*. It shall not deprive, by *act*. But it shall leave all these things to be tried and adjudged by *the law of the land*. * * * Everything which may pass under the form of an enactment, is not, therefore, to be considered the law of the land. * * * Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the legislature. There would be no general permanent law for courts to administer, or for men to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees; not to declare the law, or to administer the justice of the country."

In *Smyth vs. Ames* (169 U. S., 466, 527), Mr. Justice Harlan declared:

"The idea that any legislature, State or Federal, can conclusively determine for the people and for the courts that which it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, Federal and State, when their jurisdiction is properly invoked, to *see to it* that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given to the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land."

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5. The decision of this court in *Orient Insurance Company vs. Daggs* (172 U. S., 557), referred to in the argument below, in this connection, has no bearing upon the question of the constitutionality of the legislative mandate in the third section of the Massachusetts act as applied in this case. That case involved simply the validity of the "valued policy law" of Missouri as applied to policies of insurance made in that State by foreign corporations doing business in the State under the laws of the State, and this court, in a luminous opinion delivered by Mr. Justice McKenna, decided that *what a State may do with corporations of its own creation it may do with foreign corporations admitted into it*, a proposition which manifestly does not bear upon the question considered above under the third section of the Massachusetts statute.

6. The Commonwealth, in attempting to punish the plaintiff in error, assumed to punish him in respect of acts done beyond the territory and jurisdiction of the State, which by the application of the fiction enacted in the third section of the act of 1894, were imputed to him as done within the territorial jurisdiction of the State, in violation of the fundamental principles of American constitutional law (Cummings *vs.* Missouri, 3 Wall., 277, 319, 320, 325). The Constitution deals with substance, not shadows. The rights of the citizen are secured against deprivation by a mere legislative enactment, under any form, however disguised.

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SIXTH.

The conviction of Mr. Nutting as based upon acts done without the jurisdiction of the Commonwealth in respect to this foreign insurance was illegal, as repugnant to the Constitution of the United States and particularly its Fourteenth Amendment.

The provisions of the act of 1894, especially sections 2, 87, and 89, referred to above, do not, as is manifest, confine their prohibitions to acts done within the Commonwealth. The statute, as has been seen, proceeds upon the view that the legislature has the right to prohibit the citizens of the State under penalties from insuring their property by contracts made with foreign companies not authorized to do business in the State wherever such contracts are made, with the right to declare it an offense for any person to do any act in aid of such alleged unlawful insurance by a citizen of the State; so that if McKie had gone to New York and employed Johnson & Higgins to secure insurance on his vessel in a New York company, and they had done so, Johnson & Higgins would have been subject to prosecution under the act. The insurance contract, by section 3, would have been deemed to have been made in Massachusetts, not only as against McKie, but also as against Johnson & Higgins, and all of them would have been liable to the penalties of the statute.

The difference between this statute and the California act involved in the *Hooper case*, is brought out by the point raised in that case by the defendant "that the statute is by its terms invalid, in that it undertakes to forbid the procurement of a contract outside of the State." Upon that point

the court, speaking by Mr. Justice White, said at page *656*: "It is claimed, however, that, irrespective of this clause, the conviction here is illegal, first, because the statute is by its terms invalid, in that it undertakes to forbid the procurement of a contract outside of the State; and secondly, because the evidence shows that the contract was in fact entered into without the territory of California. The language of the statute is not fairly open to this construction. It punishes every person who *in this State* procures or agrees to procure for a resident of this State any insurance," &c. The words, 'who in this State,' cannot be read out of the law in order to nullify it under the Constitution." The case holds, by necessary implication, that if the California statute had not contained the words, "in this State," it would have been unconstitutional, and the statute is quoted by Mr. Justice Peckham, in the *Allgeyer case*, as bearing this construction. The words, "in this State," are not found in the Massachusetts act, which, as we have said, makes the procurement of insurance by any person for another in a company not authorized to do business in that State, *anywhere and everywhere*, a criminal offense.

2. The negotiation and completion of the English contract of insurance upon which this prosecution was founded, were lawful acts wholly without the jurisdiction of the Commonwealth, and it was not within the legislative power of the State to prohibit and punish them, by whomsoever performed, under the Fourteenth Amendment. The conviction, as based upon those acts, is necessarily illegal under the Federal Constitution.

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SEVENTH.

The provisions of the Massachusetts Insurance Act of 1894, under which, as construed and applied in this case, the conviction of Mr. Nutting, the plaintiff in error, was affirmed by the Supreme Judicial Court of Massachusetts, are in violation of the Fourteenth Amendment of the Constitution of the United States, by depriving the plaintiff in error of his liberty and property without due process of law, and by depriving him of the equal protection of the laws.

1. The conviction of Mr. Nutting was affirmed by the Supreme Judicial Court of Massachusetts apparently mainly under the provisions of sections 3 and 98 of the act of 1894, which, as interpreted by the court, constituted the acts done by him in Massachusetts, as set forth in the agreed statement of facts, *the negotiation and transaction by him in the State of the alleged "unlawful insurance" under the Lloyd's policy obtained by Mr. McKie in London through Tyson and Company of Liverpool.*

By section 3, it is "unlawful" for any company to make any contract of insurance (1) upon any property in the State, or (2) with any resident thereof, except as authorized by the act, or for any person as insurance agent or insurance broker to make, negotiate, solicit, or in any manner aid in the transaction of such insurance (*i. e.*, insurance on any property in the State, or with any resident thereof), except as authorized by the act; and by the same *section 3*, a contract of insurance on any property in the State must be "*deemed to be made therein.*" By *section 98*, it is made a crime for any "*person*" to act in any manner in the negotiation or transaction of "unlawful insurance" with a foreign insurance

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company not admitted to do business in the State, or as "principal or agent" to violate any provision of the act "in regard to the negotiation or effecting of contracts of insurance."

The plaintiff in error was indicted, under *section 98*, as a *person* who negotiated and transacted the alleged "unlawful insurance" in the State.

In respect to the description of the English contract of Mr. McKie in the indictment as "unlawful insurance," the court below said, in view of the decision in *Allgeyer vs. Louisiana*, that whether it be rejected as surplusage or the insurance be held to be "unlawful" because transacted through a broker acting unlawfully, Mr. Nutting was properly convicted under the statute, as construed, of the crime charged in the indictment, and the court overruled the *seventh*, *eighth* and *eleventh* exceptions to the refusals of the trial court to rule as requested, that so much of the provisions of the act of 1894 as purports to make illegal such acts as were done by the plaintiff in error in this case, is void as in conflict with the Constitution of the United States, and particularly its Fourteenth Amendment.

The court below appears to have interpreted and given effect to this whole penal statute, as, *first*, making the English contract "unlawful insurance" under the law of Massachusetts, because of the particular acts done by Mr. Nutting, who happened to be at the time by vocation or calling an insurance broker, and as, *then*, constituting those acts, as set forth in the agreed facts, the negotiation by him of that "unlawful insurance" in the State, in violation of section 98 of the act.

The judicial theory would seem to be that notwithstand-

ing Mr. Nutting had in fact nothing to do with the negotiation of McKie's insurance in London, and it was negotiated by Tyson and Company of Liverpool, as the agents solely of McKie, and not as the agents of the British underwriters, and the contract was wholly an English contract, nevertheless the acts performed by the plaintiff in error, were under the statute the negotiation by him of "unlawful insurance" in Massachusetts.

2. The conviction of Mr. Nutting is sustained by the Supreme Judicial Court of Massachusetts specifically upon the ground that Mr. McKie's insurance, although a lawful and valid English contract, made and completed in England, was unlawful insurance under the act of 1894, and Mr. Nutting was criminally liable in respect to it.

The decision in *Allgeyer vs. Louisiana* deprived this insurance of the character of *unlawful* insurance imputed to it by the statute, and it was not in the power of the legislative or judicial authorities of the State to treat the insurance and deal with it as unlawful insurance for the purpose of punishing Mr. Nutting for his acts in respect to the transaction. The insurance in question being perfectly "lawful insurance" under the supreme law of the land, as expounded by this court, the State had no power to declare and make it "unlawful insurance" for the purpose of subjecting the plaintiff in error to criminal liability in respect to it.

3. Now, the only acts done by Mr. Nutting within the territory and jurisdiction of Massachusetts were in effect these: (1) to seek employment by Mr. McKie as his servant or agent to procure insurance upon his vessel, (2) to secure, as

agent for Johnson & Higgins of New York, the authority of McKie to the placing of a contract of insurance upon the vessel, and to transmit an order for such insurance to Johnson & Higgins of New York, (3) a contract for such insurance having been negotiated and consummated by and the policy therefor delivered to and the premiums thereon paid by Tyson and Company of Liverpool, in the territory and jurisdiction of Great Britain (they acting in the premises as the servants or agents only of McKie, and not as the agents of the underwriters at Lloyd's who subscribed the policy), and such policy having come into his possession at Boston, not as the agent of the British underwriters, but as the servant or agent of McKie, to mail the policy to McKie at Boston as the lawful owner thereof.

The court below in holding that by these particular acts the plaintiff in error was legally guilty of the crime charged in this indictment, necessarily decided that under *section 3* of the act of 1894, relied on by the prosecution for conviction, the English contract of insurance was to be "deemed" to be made in the Commonwealth, or that the plaintiff in error was to be "*regarded*" as the agent of the British underwriters in Massachusetts, and in that way the English contract was to be treated as made in the State, and thus subject to its legislation for the purpose of affecting the plaintiff in error personally with criminal liability as for the negotiation of the contract in the Commonwealth. In no other way and upon no other theory was it possible, as we suppose, for the court to conclude and decide that this perfectly lawful English contract, negotiated and completed in London, was "unlawful" insurance under and subject to the law of the

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State, and that the acts of the plaintiff in error were the negotiation of such insurance by him in the Commonwealth.

4. There can be no question we apprehend that the enactment, as thus construed and given effect by the court below against Mr. Nutting, is void as repugnant to the fundamental law of the land. It deprived him of his liberty if not his property without due process of law. It was constitutionally impossible for the legislature, *for the purpose and with the effect of constituting Mr. Nutting's acts a public crime as the negotiation or transaction by him of "unlawful insurance" in the State*, to lawfully enact that a contract of insurance made in England was not made there, but was made in Massachusetts, or that Mr. Nutting, who was solely the agent and servant of Mr. McKie, in Boston, was the authorized agent there of the British underwriters. Mr. Nutting's liberty is unlawfully taken away from him through the enforcement against him by the court of legal fictions decreed by the legislature for the purpose of effecting the identical result accomplished in this case, and, of course, without due process of law. The enactment, as construed, applied, and enforced in this case, is not legislation in the constitutional sense, and nothing but a legislative mandate or decree, without validity as against any citizen of the State under the Constitution of the United States. "*Such power assimilates itself more closely to despotic rule than any other attribute of government.*" (Cooley, Constitutional Limitations, 109, Cummings *vs.* Missouri, 4 Wallace, 277, 325.)

5. The plaintiff in error further maintains that it was not in the lawful power of the legislature to make it a penal

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offense for him to perform the acts done by him in his capacity as the agent of Johnson & Higgins of New York, and Mr. McKie, in the State, with reference to the foreign insurance desired to be obtained and procured by McKie, through Johnson & Higgins of New York, although his calling or vocation at the time was that of an insurance broker, and that the statute enforced against him by the courts of the Commonwealth is an illegal interference with his common-law and constitutional rights of liberty and property, as well as an unlawful abridgment of the constitutional privileges of Johnson & Higgins, his principals in New York, through whom this lawful policy of insurance was procured in Great Britain.

Under the agreed facts, in the case, what was done by Mr. Nutting was performed by him solely as the agent of his employers, and his acts in that capacity were such acts and such acts only as might have been done by any other person in the community employed by his principals in the premises.

6. The act of 1894, as enforced against the plaintiff in error, denies to him and deprives him of the equal protection of the laws which the Fourteenth Amendment was designed to secure to him in the State of Massachusetts.

The statute, as construed and applied in this case, is a plain violation of the principle of right and justice embodied in the Amendment that "*the equal protection of the laws is a pledge of the protection of equal laws*" (Yick Wo *vs.* Hopkins, 118 U. S., 356, 369; Gulf, &c., Railway Co. *vs.* Ellis, 165 U. S., 150, 159).

As Mr. Arnould states, an "*insurance broker*" is one who

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acts as "*a middleman*" between the assured and the insurance company in the transaction of insurance (1 Arnould, Insurance, 2d ed., p. 108), and the definition is approved in *Arff vs. S. F. Insurance Co.* (125 N. Y., 57). It is certain that Mr. Nutting never acted in the character and capacity of a *middleman* or "insurance broker," between McKie and the British underwriters of the policy of insurance in question, and that his acts which are the subject of complaint by the Commonwealth, were done as the mere agent, servant or employé of Johnson & Higgins, and McKie, for the particular purposes intended by his employment, and that the same things might have been done, as we have said, as well by any other person employed for the same purposes by his principals. The legislation as interpreted constitutes the particular acts of the plaintiff in error a criminal offence, not as those of a middleman or "insurance broker," acting as such, between the assured and the underwriters, in respect of the insurance here complained of, but as the acts of a "person" whose calling or occupation at the time happened to be that of an "insurance broker." The plaintiff in error is thus deprived by the statute of a common-law right and privilege accorded to all other "persons" in the community, and denied in that regard the equal protection of the laws of the State.

The legislature of a State has no power to arbitrarily select one individual or class of individuals, and visit a penalty upon him or them which is not imposed upon others guilty of like delinquencies.

It has been impressively said by Mr. Justice Brewer: "No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speak-

ing for this court, in *Yick Wo vs. Hopkins* (118 U. S., 356, 369): '*When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.*' * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government" (Gulf, etc., Railway Co. *vs.* Ellis, 165 U. S., 159, 160).

EIGHTH.

The acts done by Mr. Nutting, as stated in the agreed facts, are acts which the Legislature of Massachusetts had no power to condemn and punish as a criminal offense against the Commonwealth under the Fourteenth Amendment of the Constitution of the United States.

1. If the plaintiff in error had not the lawful right to do the acts upon which his conviction as for a public crime was based in this case, it is hard to see how he can be regarded as a free man and a free citizen of a free country, and it is equally difficult to perceive how that character can be attributed to the American ship-owner and assured in Boston for whom he acted. The rights and liberties of Mr. McKie, as well as those of Mr. Nutting, it will be perceived, are involved in the present controversy.

In *Schollenberger vs. Pennsylvania* (171 U. S., 1, 24) this court, speaking by Mr. Justice Peckham, said: "The importer had the right to sell not only *personally*, but he had the right to employ an *agent* to sell for him. Otherwise his

right to sell would be substantially valueless, for it cannot be supposed that he would be personally engaged in the sale of every original package sent to the different States in the Union. Having the right to sell through his agent, a sale thus effected is valid." In the *Schollenberger* case, the prosecution under the State law was against the authorized agent of the manufacturer and importer, but the agent was protected against the attempted exertion of the so-called police power of the State by the shield of the constitutional rights of his principal. The principle is the same here. Mr. McKie having the constitutional right to effect this insurance with the underwriters at Lloyd's, there can be no punishment inflicted by the State upon the plaintiff in error for doing what he did as the agent or servant of McKie in respect to the insurance.

2. There can be no valid legislation by a State under its police power, or otherwise, which encroaches upon individual rights granted, secured or protected by the Federal Constitution. As said by Mr. Justice Harlan in *New Orleans Gas Company vs. Louisiana Light Company* (115 U. S., 654, 661), "definitions of the police power must be taken subject to the condition that the State cannot, in its exercise, for any purpose whatever, encroach upon the powers of the General Government, or *rights granted or secured by the supreme law of the land.*" The same principle was declared by Mr. Justice Strong in *Railroad Company vs. Husen* (95 U. S., 465), when he said that under the color of the police power "*objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution.*"

There can be no doubt, as we have said, that the object of

this penal legislation, as interpreted by the courts below, and enforced against the plaintiff in error in this case, was to prevent Mr. McKie and the other citizens and people of the State from exercising their right to protect their property in the State by contracts of insurance made and to be performed in another State or foreign country with companies not authorized to do business in the Commonwealth. The legislation is thus a direct encroachment upon a constitutional right of the citizens and people of the State, as recognized by this court, and it can have no validity against any person to whom it may be sought to be applied by the authorities of the Commonwealth in respect to such a contract as that involved in this case.

3. Under the decision and doctrine in *Allgeyer vs. Louisiana*, as must be conceded, a State legislature, since the Fourteenth Amendment, possesses no arbitrary power of criminal legislation over acts performed by a citizen within the State under or with respect to a contract of insurance made or desired to be made by him outside of the State with a foreign corporation even not authorized to do business in the State, much less natural persons like the London Lloyds.

The legislature of Louisiana had assumed by its insurance act arbitrary power "to prevent persons from *dealing with* marine insurance companies that have not complied with law," and to make it a crime "to effect insurance on property, then in this State, in any marine insurance company which had not complied in all respects with the laws of this State." The public policy of that State was declared by the statute to be that no citizen *while in the State* should make a contract with any foreign corporation not authorized to do business in the State, wherever the contract was made, or do

any act in the State to effectuate such a contract. The supreme court of the State had declared this to be the public policy of the State, and affirmed its validity. It has said, "*the sovereignty of the State would be a mockery if it had not the power to compel its citizens to respect its laws.* Individual liberty of action must give way to the greater right of the *collective people* in the assertion of a well-defined policy, designed and intended for the general welfare. The act of insurance was done *within the State and the offense denounced by the statute was complete.*"

Such doctrine may have been well enough before the Fourteenth Amendment, when it was often supposed that the legislature for the most part was a sovereign with unlimited powers; but this court in effect said by its judgment in the *Allgeyer case* that since the Amendment the sovereignty of the people would be a "mockery" if their creature, the legislature, could enact such a law as that, and that individual liberty in respect to the subject of insurance is not under the unrestrained power of the legislature. This court would not accept the idea that the legislature could set up and enforce an alleged "*public policy*" upon this subject which was hostile to the rights of individual liberty and property belonging to the citizen as a member of a free Republic.

The effective act of insurance, in that case, *was* done within the State in violation of the statute. The open policy made in New York was substantially an executory contract, which did not and could not attach to the property desired to be insured, before and until the act complained of and sought to be punished by the prosecution was done by the assured within the State in violation of the statute. But this court decided that the legislature had no power, under its police

authority, or otherwise, to prohibit and prevent the doing of such an act by the citizen within the State, because it was necessary, appropriate or useful to enable him to execute the contract made out of the State for the insurance of his property in its limits. To concede to the citizen the authority and right to obtain the open policy in New York, but to allow the legislature to forbid him from doing in the State the act complained of by the prosecution, would be tantamount to allowing the State to prohibit him from entering into such a contract at all in New York. The court, in other words, decided, in the *Allgeyer case*, as we suppose, that the right of the citizen to insure his property by a contract made and to be performed out of the State, included, as an essential incident to the enjoyment thereof, the right to do and perform within the State acts necessary, appropriate, or useful to the execution of the contract, and, therefore, that such acts are not subject to the territorial police power of the State for the purpose of preventing them by criminal punishment or otherwise. Such acts the citizen is guaranteed the right to perform within the State by the Fourteenth Amendment of the Constitution, the so-called police power of the State to the contrary notwithstanding.

By means of the act performed within the State of Louisiana by the defendant in the *Allgeyer case*, a special contract of insurance was effected under his open policy upon his cotton in the State, but that contract was a New York contract, as held, and this court adjudged that the act done by the defendant within the State by means of which that special contract of insurance was effected by him,

could not lawfully be made a penal offense by the State legislature.

4. It is submitted, on the part of the plaintiff in error, that the legislature of Massachusetts possessed no more authority, under its so-called police power, to prohibit him by penal enactment from doing within the State, on behalf of his principals, the particular acts here complained of as a criminal offense, than had the legislature of Louisiana to make it a crime, by its police power, for Mr. Allgeyer to perform within that State the particular act which was the subject of complaint in the prosecution against him, and by which he effected the special contract of insurance, under the open policy, on his property in the State.

It would seem impossible to successfully maintain, under the juridical principles recognized by this court in *Allgeyer vs. Louisiana*, that Mr. Nutting's acts, in his capacity as the agent of Johnson & Higgins, and McKie, were such acts as the legislature had the right, under its police power, to make a criminal offense against the State, at least in reference to the Federal Constitution.

5. Practically, the only substantive and effective act performed by the plaintiff in error was the transmission, no doubt, by mail, from Boston to New York, of the order or authority given by McKie to Johnson & Higgins of New York to procure for him the insurance he wished to obtain on his new vessel. Everything else was mere talk.

It is not within the competent authority of the legislature to condemn and punish this act of Mr. Nutting as a crime against the Commonwealth unless it possesses absolute and

arbitrary power to prohibit and prevent any and all acts performed in the State having reference to insurance on property in its limits desired to be procured and procured by a citizen under a contract made and to be performed in another State or another country. Such power no State legislature possesses under the Constitution of the United States.

6. Let it be supposed that Mr. Nutting had gone to New York by request of Mr. McKie, and carried with him an order for Johnson & Higgins, his principals, to place outside of Massachusetts the insurance McKie wanted upon his new vessel, can it be maintained that such acts on the part of Mr. Nutting could be lawfully made a punishable crime by the legislature in the exercise of its so-called police power? Plainly the right of McKie to apply directly to Johnson & Higgins with respect to his desired foreign insurance included and carried with it the right to ask and employ their agent in Boston to transmit to them by mail or otherwise an order or authority to obtain such insurance, and the act of the agent under such employment cannot be made by the State a public crime.

7. The theory that the legislature may lawfully declare Mr. Nutting to be the agent or an agent of the British underwriters in Massachusetts and deal with his acts as such, cannot be entertained for a moment under the Fourteenth Amendment. It is equally impossible to maintain, as we suppose, that the legislature may strip the plaintiff in error bare of all legal right to become and act in the capacity of an agent of Johnson & Higgins, who are engaged in a lawful calling in New York, and of all

such right to have communication and intercourse with a Boston ship-owner about insurance on his property to be effected outside of the Commonwealth by or through Johnson & Higgins of New York, and of all legal right to secure for his principals the ship-owner's employment and authority to procure insurance on his vessel in another State or a foreign country, and transmit to his principals by mail or otherwise the requisite order to them to obtain such insurance for the ship-owner, and that the legislature can do this by making such acts on his part a public crime.

The claim asserted on the part of the legislature is one of discretionary and arbitrary authority and power to so deal with the right and freedom of contract and other natural rights and capacities of the plaintiff in error, as to render it unlawful for him to make an *agreement* with Johnson & Higgins to become and act as their agent in the Commonwealth, and disqualify and disable him from doing anything under his agreement with them in his character as their agent in Massachusetts, with reference to marine insurance desired and proposed to be obtained by a citizen of the State, through Johnson & Higgins, outside of the territory of the Commonwealth.

The act in question as applied in this case in fact operates in effect upon the natural rights and privileges and the legal capacities not only of the plaintiff in error, but also of Johnson & Higgins, and assumes to put all of those persons under a sort of outlawry in the State with respect to the subject of foreign insurance upon the property of citizens of the State; and the practical question would seem to be whether such an arbitrary enactment can be sus-

tained as a valid exercise of the police power of the State since the Fourteenth Amendment.

It is respectfully submitted that the legislature cannot arbitrarily interfere in this way, by criminal enactment, with the contractual liberty and freedom, and the natural rights and capacities, of Mr. Nutting, and Johnson & Higgins, for the purpose and to the end and as a means of preventing the citizens of the State from exercising their common-law and constitutional right of foreign insurance in respect to their maritime property in the Commonwealth.

"Liberty" includes the right to contract as others may, and to take away that right from a class of persons following lawful pursuits or callings in the State, is simply to deprive them of a time-honored right which the Constitution undertakes to secure to every citizen.

8. The legislature derived no authority to prevent Mr. Nutting from acting as the agent and attorney of Johnson & Higgins, in the State, under his agreement with them, by punishing such acts as were done by him in this matter, from the fact and character of his general occupation as an insurance broker. His license is not a privilege or franchise conceded by the State according to its will. It gave the legislature no arbitrary power over him and his private contracts or business pursuits. It is within the just and constitutional limits of the legislative power to make reasonable and uniform regulations in respect to callings and business in the State, but there is no warrant for an exercise of legislative power under the pretense and color of regulating a calling or business, which operates to subvert the liberty of pursuit

and the freedom of contract and employment on the part of the citizen. As said by Judge Cooley, "the general rule undoubtedly is, that any person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching upon the rights of others. It is not competent, therefore, to forbid any person or class of persons, whether citizens or aliens, from offering their services in lawful business or to subject others to penalties for employing them" (Constitutional Limitations, p. 745; Baker *vs.* Portland, 5 Sawyer, 566).

Mr. Nutting, in respect of the matter complained of in this prosecution, acted as the lawful agent or employé of his principals in New York, who had a right to his services, and not as a broker or middleman negotiating or effecting insurance in the State, and no insurance was negotiated or effected there by or through him, or any one else, on behalf of Mr. McKie.

It is well known that in most commercial countries there are persons more or less conversant with the subject of marine insurance, who are not or who do not act as "insurance brokers," but who are employed as mercantile agents, as Mr. Lowndes states, "to effect insurance in one country on behalf of the owner in another, or employed as men of business because the owner is out of business, or for some other reason prefers to do his work by deputy" (Lowndes, Marine Insurance, p. 38). This is a useful occupation in a commercial country, and one which in a free country is not and cannot be made the subject of hostile or arbitrary legislation against the citizen.

As said by Mr. Justice Brown in *Lawton vs. Steele* (152 U. S., 133, 137): "The legislature may not, under the guise

of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations." And as declared by Mr. Justice Harlan, in *Mugler vs. Kansas* (123 U. S., 625, 661): "If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

9. The broad ground upon which this penal legislation, as construed and enforced by the courts below, should be deemed to be, as we submit, in violation of the fundamental law of the country, has been already indicated, and it is that as the insurance upon which Mr. Nutting's conviction was based, is wholly lawful insurance in the contemplation and view of the Constitution of the United States, the legislature cannot treat it as an unlawful transaction as against any person whomsoever in the Commonwealth. State legislation assuming to declare such a lawful contract of insurance as that of Mr. McKie unlawful insurance for the purpose of punishing the plaintiff in error as an insurance broker, or otherwise, for what he did in respect to the transaction, as a criminal offense against the Commonwealth, is necessarily arbitrary legislation, which can have no effect or operation under the supreme law of the land.

The object of this enactment, as directed against the plaintiff in error, was, as we have said, to prevent the making by the citizens and people of the Commonwealth of such foreign contracts of insurance as that of Mr. McKie upon their

property in the State,—contracts which the State legislature has no jurisdiction or power to prevent or prohibit under the Constitution of the United States.

If there is any principle well settled in our jurisprudence it is that even an acknowledged power cannot be exerted for the purpose of effecting indirectly an unconstitutional object which the legislature cannot directly attempt to reach.

It is very clear under the decisions of this court that in any case and every situation where the end is unlawful and repugnant to the supreme law of the land, it is equally unlawful and equally in violation of the Constitution to use any means, however proper, or within the power of the State for lawful purposes, for the attainment of that unlawful end, or the accomplishment of that unlawful purpose. It cannot be otherwise than unlawful for the legislature to use any means whatever to accomplish an unlawful purpose (Brown *vs.* Maryland, 12 Wheaton, 419; Ward *vs.* Maryland, 12 Wall., 431; Woodruff *vs.* Parkham, 8 *id.*, 130–140; Hinson *vs.* Lott, *id.*, 152; Welton *vs.* Missouri, 91 U. S., 279–282; Cook *vs.* Pennsylvania, 97 U. S., 573).

10. It was said by this court in *Bank of Augusta vs. Earle* (13 Peters, 588) that a corporation "must dwell in the place of its creation, and cannot migrate to another sovereignty." And in *Paul vs. Virginia* (8 Wallace, 181), it was added that "the recognition of its existence even by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States, a comity which is never extended where the existence of the corporation or the exercise of its powers is prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in

other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose."

Whatever power under this doctrine a State may exert by criminal legislation for the purpose of preventing a foreign insurance corporation from exercising its franchises within the limits of the State, there is certainly nothing in the doctrine that furnishes any support or warrant for penal legislation designed to prevent the citizens of the State (who are also citizens of the United States) from exercising their natural right to insure their property by contracts made in England with the underwriters at Lloyd's, and which constitutes it a crime for a person whose calling is that of an insurance broker to do such acts in reference to such foreign insurance as were performed by the plaintiff in error, as the agent of Mr. McKie, in respect to the English contract upon which this prosecution was founded.

The business involved in the insurance of the maritime property of a citizen of the State by a contract made and completed by the British underwriters in England, and which is also to be performed in England, is not done within the territory of the State, and the State has in fact no jurisdiction over it or in regard to it, and penal legislation directed against the agent of the assured in respect to such foreign insurance, although he is an insurance broker, is and can only be such arbitrary legislation on the part of the State as was intended to be prohibited by the Fourteenth Amendment.

The purpose of the Amendment was to exclude everything

of an arbitrary character in State legislation affecting the rights and liberties of the citizen, and it can be nothing less than an arbitrary interference with such rights and liberties for the legislature to undertake to deal criminally with any citizen for acting as the agent of another in respect to a lawful and valid contract of marine insurance made by his principal with natural persons in a foreign country, and which the State has no lawful power to prevent or prohibit under the Constitution of the United States.

The contract as made and completed in a foreign country is outside of the jurisdiction of the State of the residence of the assured and his agent, and subject to the jurisdiction and laws of another sovereignty. It is not within the legislative authority of the State, therefore, to punish the assured or the agent of the assured in respect of the transaction. The transaction is one, in fact, in which the State has no interest in any just constitutional sense. The State cannot lawfully punish the agent in respect to the making of the contract, as entered into in the foreign country, any more than it can legally punish the assured himself on account of that transaction, and any legislation of the State providing for such punishment, in the case either of the assured or his agent, is such arbitrary legislation as is within the prohibition of the Fourteenth Amendment.

11. It is not maintained in the opinion of the Supreme Judicial Court of the State in this case, as we understand it, that the penal enactment under which the plaintiff in error was convicted of a crime against the Commonwealth, is an intended exercise of the power of the legislature to prohibit the underwriters at Lloyd's from acquiring a domicile or

from doing business by their agents within the State, but the position would seem to be that the enactment is an intended execution of the policy of the legislature against business intercourse for insurance purposes between the people of the State and the British underwriters, and that for such purpose the legislature has the power to provide for the arbitrary punishment of a citizen of the Commonwealth for acting as the agent of the assured in respect to a contract made by those underwriters in England as if he were in fact the agent of the insurers, and as if the contract were in fact made within the limits of the State. Such a view of the legislative power, we submit, finds no support in the principles upon which our system of constitutional and republican government is founded, and which were intended to be safeguarded by the Fourteenth Amendment.

NINTH.

The provisions of the Massachusetts Insurance Act of 1894, involved in this case, as interpreted and enforced by the courts below, are in violation of the rights of Mr. McKie, and the other American ship-owners in the Commonwealth, as well as those of the plaintiff in error, under the Fourteenth Amendment of the Constitution of the United States. As respects Mr. McKie, the legislation is an infringement of each of the prohibitions of the Amendment.

1. The Fourteenth Amendment after declaring that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside, goes on to declare that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

*

nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Under the first clause of the Amendment, Mr. McKie, the American ship-owner and assured in this case, as a citizen of Massachusetts, is a citizen of the United States residing in that State; and the proposition now is that the Massachusetts act, as enforced against the plaintiff in error, according to the interpretation and effect given to it by the courts below, in this case, violates the fundamental rights of Mr. McKie, under the Amendment, and specially operates to abridge his privileges as a citizen of the United States, and for that reason is invalid and void.

2. The Supreme Judicial Court of Massachusetts, while recognizing the right of McKie, if so minded, to apply from Boston to the underwriters at Lloyd's for insurance on his property, affirmed the competent power of the legislature, for the purpose and to accomplish the object intended by it, to make it a crime for Mr. Nutting, the agent of Johnson & Higgins, and of McKie, to do the particular ministerial acts performed by him in the State with respect to the foreign insurance desired and obtained by McKie upon which the prosecution and conviction in this case were based.

The object of the legislature in making it a criminal offense for Mr. Nutting to do the acts performed by him, and in providing for his punishment therefor, avowedly was, as shown, to carry into effect the unconstitutional prohibition of the legislature against such foreign contracts of insurance on the part of citizens of the State, and to restrain and prevent McKie from protecting his property

by insurance with the London Lloyds, although as now acknowledged it was his inviolable constitutional right to insure his property by a contract made with those underwriters in England, anything in the Massachusetts act to the contrary notwithstanding.

3. It is respectfully maintained on the part of the plaintiff in error that Mr. McKie's right to make a contract with the underwriters at Lloyd's for the protection of his property in Massachusetts, included and carried with it as an essential incident to the enjoyment of that right, the right on the part of McKie to employ Johnson & Higgins, and the plaintiff in error, as his agents or servants, for the purposes for which they acted in the transaction involved in this case, and that the legislature had no more power to deprive him of that right by penal legislation directed against his agents or servants in such a matter of proposed foreign insurance, than it possessed to make it a crime for McKie to apply to the British underwriters directly and personally from Boston for the insurance he desired on his property. The principle is the same, as already said, as that applied by this court in the *Schollenberger case* (171 U. S., 1), where the constitutional right of the importer was held to carry with it as an incident the right to employ an agent to execute his constitutional right, and to protect the agent of the importer in doing what he did against the exercise of the so-called police power of the State.

The great general doctrine of the court is that every constitutional right of liberty and property should be liberally construed and enforced. It is not to be made by construction "*a mere barren and abstract right, without any practical opera-*

tion upon the business of life" (Chief Justice Taney in Bronson *vs.* Kinzie, 1 Howard, 318; *Pumpelley vs. Green Bay* Company, 13 Wallace, 166).

Of what avail, it may be asked, would be the constitutional right of an American ship-owner, like McKie, to insure his maritime property where he has a mind to—with the London Lloyds if deemed expedient—if he could be denied by the legislature the services of competent persons, acquainted with the practice of marine insurance, as his agents, for the performance of such ministerial acts as were done in this case by Johnson & Higgins, and Mr. Nutting, in behalf of McKie, with respect to the marine insurance he desired to obtain on his American vessel out of the State of Massachusetts? Practically, the right would be, in the language of Chief Justice Taney, "a mere barren and abstract right, without any practical operation upon the business of life."

It is submitted that Mr. McKie had the right to apply to Johnson & Higgins in New York to obtain such foreign insurance for him, and he had the right to apply to them, through Mr. Nutting, their agent in Boston, for that purpose, and through him to send an order to New York to Johnson & Higgins to obtain the foreign insurance, and to receive the foreign policy as negotiated abroad at the hands of Johnson & Higgins and Mr. Nutting, and the legislature had no power to deprive him of the right to do these things by punitive legislation directed against those ministerial agents, or any of them.

To concede to Mr. McKie the right to make a foreign contract of insurance with the London Lloyds, but to forbid him from employing intelligent persons, acquainted with

the practice of insurance, to do what was done for him ministerially by the persons who acted as his agents in this matter, is tantamount to a prohibition against the making of any such a contract at all in Great Britain.

4. It is submitted that the Massachusetts act as enforced in this case against Mr. Nutting is violative of the fundamental rights of McKie under the Constitution, and as respects him is an infringement of each of the prohibitions of the Fourteenth Amendment. The right of a citizen of the United States to protect his vessel engaged or to be engaged as an American vessel in foreign or domestic commerce under the navigation laws of the United States, by a contract of marine insurance made with foreign underwriters, like the London Lloyds, in a foreign country, may be properly regarded as one of his rights and privileges as a citizen of the United States in respect to such property within the just sense of the Fourteenth Amendment. This court has not conclusively defined the privileges and immunities of a citizen of the United States under the Amendment in a general classification, preferring no doubt to decide each case as it may arise, but it would certainly seem that among the special privileges of a citizen of the United States as such is his right of personal and business intercourse with foreign countries and their subjects or citizens, and of entering into all contracts abroad with those subjects or citizens, including contracts of marine insurance, under the sanction of the territorial law, and that this his right is protected by the Amendment from being abridged in any manner by the action of the State in which he may happen to be domiciled. Judge Cooley, considering the line of distinction between

the privileges and immunities of citizens of the United States and those of citizens of the several States, observes: "Whatever one may claim as of right under the Constitution and laws of the United States by virtue of his citizenship, is a privilege of a citizen of the United States. Whatever the Constitution and laws of the United States entitle him to exemption from, he may claim an immunity in respect to. *Slaughter House cases*, 16 Wall., 36. And such a right or privilege is abridged whenever the State law interferes with any legitimate operation of the Federal authority which concerns his interest, whether it be an authority actively exerted, or resting only in the express or implied command or assurance of the Federal Constitution or laws" (Cooley, Principles of Const. Law, 246; Cooley, Const. Limitations, 6th ed., p. 489).

Massachusetts is one of the greatest Commonwealths in the world, but in Great Britain and in respect to such a foreign contract as that made by this policy of the underwriters at Lloyd's, for the insurance of an American vessel, Mr. McKie is known only as a citizen of the United States, and his rights under the contract are by the Constitution and the public law ultimately under the international protection of the sovereign Government of the United States, and in their character as rights possessed and exercised by him as a citizen of the United States, and not as a citizen of Massachusetts.

5. As this court has said, the power of Congress to regulate international and interstate commerce embraces within its control all the *instrumentalities* by which that commerce may be carried on. "The subjects, therefore, upon which the

power may be exerted are of infinite variety" (Gloucester Ferry Co. *vs.* Pennsylvania, 114 U. S., 196). In that case, the court referred approvingly to the statement of Judge Cooley that under the commercial power Congress may descend to the most minute directions if it shall be deemed desirable, and to whatever extent ground shall be covered by those directions, the exercise of State power is excluded (Cooley, Constitutional Limitations, 732). It would seem clear, therefore, that among the subjects over which the commercial power of Congress may be exercised is that of insurance upon American vessels engaged in the navigation and trade of the United States. It has been, moreover, adjudged by this court, affirming the early decision of Mr. Justice Story in *De Lovio vs. Boit* (2 Gallison, 398), that the contract of marine insurance is a maritime contract within the admiralty and maritime jurisdiction of the United States (Insurance Company *vs.* Dunham, 11 Wallace, 1). And by a settled doctrine of international law an American ship on the high seas is a part of the territory of the United States, and subject exclusively to the national jurisdiction, and in a foreign port "brings with and keeps over her to a very considerable extent," as said by Mr. Webster in his celebrated correspondence with Lord Ashburton, "the jurisdiction and authority of the laws of her own country" (6th Webster's Works, 506; Wharton, Conf. of Laws, § 356; Crapo *vs.* Kelly, 16 Wallace, 610).

In view of these principles, we submit, the right of Mr. McKie to insure his American vessel by a contract effected abroad with the London Lloyds, or other foreign underwriters, should be deemed one of his rights and privileges as a citizen of the United States, under the Fourteenth

Amendment, which the Commonwealth of Massachusetts cannot abridge or interfere with by such hostile legislation as that enforced against his agent, the plaintiff in error, in this case.

6. But if the Massachusetts act, as here enforced, does not abridge one of the privileges of this American ship-owner as a citizen of the United States, it certainly does operate to deprive him of a portion of his liberty and property, as understood in our jurisprudence, without due process of law.

The intended effect of the legislation under consideration is to subject him to a species of business servitude in the State of his residence with respect to this important matter of foreign insurance on his maritime property there. Upon the face of the act, it is "unlawful" for him and a crime to insure his ship by a marine policy made in a foreign country with marine underwriters not authorized to do business in the State, and such a contract is imputed to him and everybody as "made in this Commonwealth" for the purposes of the criminal jurisdiction of the State. If the ship-owner employs insurance agents in a foreign country, as Tyson and Company in this case were employed, to obtain for him a foreign policy of insurance on his vessel, a thing that may be absolutely necessary for his purposes in dealing with his property abroad, the insurance thus procured is stigmatized as "unlawful" insurance, and his ministerial agents or servants in the State are subject to prosecution as for a crime in and against the Commonwealth. The legislation thus effectually takes away from him the right to employ persons conversant with insurance to do any ministerial acts in aid or furtherance of his inviolable right of foreign insurance

under the Constitution, and effectually prevents him from exercising that right in a manner conducive to his interests as an American ship-owner. His right is reduced to a mere "barren and abstract one, without any practical operation upon the business of life." It cannot be said that by this legislation the citizen is not deprived to a certain extent of his liberty, and potentially of his property or a portion of it, without due process of law.

7. If the Massachusetts act of 1894 be allowed to have effect with regard to contracts of marine insurance such as that here in question, the American ship-owner in the State is practically debarred intercourse with a certain class of those with whom it is or may be of the highest importance that he should have the right and ability to establish contract relations beyond the territory of Massachusetts, while the community at large is allowed the natural right and privilege of making such contracts with the citizens or subjects of foreign countries as may be necessary or convenient for the use and enjoyment of their property untrammeled by burdensome and restrictive legislation on the part of the Commonwealth. If that is not a denial of the equal protection of the laws, it is hard to see what would come within the constitutional prohibition.

The practical result of the restrictive legislation applied and enforced in this case, if its validity should be affirmed, would undoubtedly seem to be that with reference to the matter involved, Massachusetts and the American ship-owners in the Commonwealth become isolated from the rest of the civilized world.

It is respectfully submitted that the judgment of the Superior Court of the State of Massachusetts should be reversed, and that the case should be remanded with directions to that court to grant a new trial.

J. HUBLEY ASHTON,
Of Counsel for the Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 88.

CHARLES H. NUTTING, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPERIOR COURT OF THE STATE OF MASSACHUSETTS.

REPLY BRIEF.

J. HORLEY ANDREW,
Of Counsel for Plaintiff in Error.

Judd & Detweiler, Printers, Washington, D. C. 1899

Supreme Court of the United States

OCTOBER TERM, 1901.

No. 32.

CHARLES H. NUTTING, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF MASSACHUSETTS.

Brief in Reply for Plaintiff in Error.

I.

The brief submitted by the learned Attorney General of Massachusetts fails to meet the proposition in the brief for the plaintiff in error that the provisions of the act of 1894 under which this prosecution was instituted, as framed, are not a constitutional exercise of the power of the State to prevent unauthorized foreign insurance companies from doing business within its limits, and to prevent the citizens of the Commonwealth from contracting with such companies within its jurisdiction, except by the observation on page 5 of the brief that the

act "does not pretend to prevent or make it criminal for a resident of the State to insure his property in whatever company he may desire," and the further observation in a sentence on page 6 of the brief that "the liberty of the citizen to make contracts of insurance *outside* of the State is not attempted to be abridged, but the liberty of an insurance agent to solicit insurance business for companies without the State is made a criminal offence."

Clearly, the legislature by this act purported to make it unlawful and criminal for the citizens of the State to contract either within or without the State for the insurance of their property with unauthorized foreign insurance companies, unless and except as expressly permitted to do so by the act (sections 3, 98). That is the very essence of the legislation.

The only exception to the rule of the act is found in *section 83*, which permits the licensing of persons specially to effect a particular kind of insurance, namely, "*fire* or *bombardment* insurance on property in this Commonwealth in foreign insurance companies not authorized to do business in this Commonwealth," upon the stringent terms and conditions prescribed in that section. The citizen before receiving such a license must prove that he is unable to procure in companies admitted to do business in the State, the amount of insurance necessary to protect his property, and he can only procure insurance under the license after he has procured insurance in companies admitted to do business in the State to the full amount such companies are willing to write on his property.

By *section 84* foreign companies admitted to do business in the State are authorized to make insurance contracts on

property therein, "*only* by lawfully constituted and licensed resident agents," and cannot make such contracts by their agents in the State or country of their legal domicile.

Before the enactment of the Massachusetts insurance act of 1887, c. 214, § 3, if insurance was made by a foreign insurance company without complying with the requisitions of the statute, the *contract* was declared *valid* by statute, while a penalty of $1,000 was imposed upon the making of the same (Pub. Sts., c. 119, § 200; Gen'l Sts., c. 58, § 72; Hartford Ins. Co. *vs.* Matthews, 102 Mass., 221).

The act of 1887 made the contract itself illegal, as does the act of 1894.

The statute, as observed in regard to the Louisiana act of 1894 in the *Allgeyer case*, is not only an apparent but a real interference with the right of the citizens "to place insurance on property of their own wherever and in what company they desired," and is not justified "for the purpose of upholding what the State says is its policy with regard to foreign insurance companies which had not complied with the laws of the State for doing business within its limits" (165 U. S., 588, 589). And as said in that case, the insurers did no business within the State, and the contract was not therein made.

II.

The Commonwealth while deeming it unimportant to discuss the question whether the locus of the insurance contract in this case was within or without the State, submits that the contract is to be construed as made within the State (p. 4).

This cannot well be maintained, we suppose, in a Massachusetts case, in view of the judgment of the highest court of that State in *Commonwealth Mutual Insurance Company vs. Knabe Manufacturing Company* (171 Mass., 265), cited at length in the brief for the plaintiff in error (pp. 39–41).

The decision in that case is also clear to the point that Mr. Nutting, although an insurance broker, cannot be deemed or treated as the agent for any purpose of the British underwriters who executed the Lloyd's policy in this case.

If the policies issued by the Massachusetts company, plaintiff in that case, on the property of the Maryland company, were Maryland contracts, the policies were confessedly illegal and void, as made by the plaintiff in violation of the law of Maryland. The Supreme Judicial Court of the State reached its conclusion in favor of the legality and validity of the policies as Massachusetts contracts by holding that all the *insurance brokers* through whom the contracts were procured from the plaintiff, could be regarded only as the agents of the defendant company who obtained the insurance.

It is also clear under the decision of the Supreme Judicial Court of Massachusetts in *Commonwealth Mutual Insurance Co. vs. Wood* (171 Mass., 484) that the insurance by the London Lloyds on the property of Mr. McKie, in Boston, did not involve the doing of any *business* by those underwriters in Massachusetts.

In reply to the defense in that case that the Massachusetts company was not authorized or licensed to do business by some of the States of the Union in which it incurred losses on property insured in those States, the court deemed it

sufficient to say, "the *business* of the company was conducted *in this State*, and the contracts were valid here."

III.

It is said in the brief for the Commonwealth that the act of 1894 "only makes it an offense for an agent or broker to negotiate or in any manner aid in the transaction of insurance with a foreign insurance company not admitted to do business in Massachusetts. It is the doing of such acts which is in terms charged in the indictment" (p. 5).

We do not so understand the act or the indictment.

Section 3 says it shall be unlawful for "any person *as insurance agent or insurance broker*, to make, negotiate, solicit, or in any manner aid in the transaction of such insurance, unless and except as authorized under the provisions of this act"; but the section carries with it no penalty against the person who "as insurance broker" violates that prohibition.

As has been seen, the penalty sought to be enforced against Mr. Nutting is that denounced in *section 98* against "any person who shall act in any manner in the negotiation or transaction of unlawful insurance," &c.; and the indictment is against him as a person who, at the city of Boston, on November 18, 1898, for Mr. McKie, negotiated with and procured to be issued by certain underwriters the Lloyd's policy on Mr. McKie's vessel in Boston, upon which the prosecution was founded.

As has also been said, Mr. Nutting is not indicted for any alleged unlawful acts done by him "as insurance agent or insurance broker," and is not charged with negotiating, or

soliciting, or aiding in the transaction of the Lloyd's policy "as insurance agent or insurance broker;" and it is clear under the agreed facts that the particular acts done by him in the matter of that foreign insurance upon which the conviction was based, were *not* performed by him "as insurance agent or insurance broker," but were performed by him ministerially and solely as a person who was the agent or servant of Johnson & Higgins and McKie, and under and pursuant to his lawful employment as such agent or servant.

He was convicted of the offense charged in the indictment by the enforcement against him of the unconstitutional mandate in *section 3*, by which the judicial courts were obliged to treat this foreign contract made *outside* of the State, as a domestic contract made in Boston, for the purpose of subjecting him to the penalty imposed in *section 98* of the act.

IV.

The Commonwealth finally relies implicitly upon the *Hooper case;* but, we submit, in the language of the court in the *Allgeyer case*, "the facts of that case and the principle therein decided are totally different from the case before us" (165 U. S. 588).

The conviction in the *Hooper case*, as has been said, was based (1) upon a constitutional statute of California, which, as this court declared, undertook to do no more than make it an offense for a person to procure *in the State* insurance for a resident in an unauthorized insurance company (2) upon a contract made in the State by such an unauthorized company.

"The words, '*who in this State*,' cannot be read out of the law in order to nullify it under the Constitution." (155 U. S. p. 656.)

As stated in the brief for the State in the *Hooper case*, "until the rate of premium was assented to by Mott, and the policy in the China Mutual Company accepted by him, there was no completed contract, and Mott could not have been compelled to take the contract offered to him."

This court said that the Fourteenth Amendment "does not guarantee the citizen the right to make within the State, directly or indirectly, a contract the making whereof is constitutionally forbidden by the State." (155 U. S., 658.)

But the Fourteenth Amendment *does* guarantee the citizen the right to make such a foreign contract as that involved in this case, and no State legislature can constitutionally forbid the making of it, directly or indirectly.

That portion of the opinion of the learned court in the *Hooper case* relied on by the Commonwealth, in which it is said, "if it (the insurance) were obtained for the resident by a broker who was himself a resident, this would be a procuring within the State and be covered by the statute," was an answer, as we understand, to the strenuous contention for Hooper that the fact that the New York company had no authorized agent in California, excluded "the *possibility* of the insurance having been *procured* within the State;" and the meaning of the court clearly was that if the insurance were obtained *within the State* for a resident by a broker, himself a resident, this would be a "*procuring*" within the State covered by the statute, although the foreign company had no agent as such in California.

The insurance *was* obtained by Hooper for Mott within the State, where the contract was accepted and the premium paid to Hooper for the company by Mott.

The court never meant to say, as we suppose, that because a person happened to be by occupation an insurance broker, he could be dealt with criminally for any acts whatever done by him in respect to a foreign insurance contract made and completed through others out of the State, just as if he had in fact negotiated or effected the contract as an agent of the underwriters within the State.

V.

This court is not concluded by what is said in the opinion of the court below in respect to the meaning of the term "unlawful insurance," as used in *section 98* and in the indictment.

In *Yick Wo vs. Hopkins* (118 U. S., 356, 366) the supreme court of California had expressed its clear opinion in regard to the meaning and effect of the legislation there in question, but this court, speaking by Mr. Justice Matthews, said:

"That, however, does not preclude this court from putting upon the ordinances of San Francisco an independent construction; for the determination of the question, whether the proceedings under these ordinances and in enforcement of them are in conflict with the Constitution of the United States, necessarily involves the meaning of the ordinances, which, for that purpose, we are required to ascertain and adjudge. We are consequently required to differ from the supreme court of California upon the real meaning of the ordinances in question."

VI.

But whatever meaning and effect is given to *section 98* of the act of 1894, the statute as applied and enforced in this proceeding against Mr. Nutting, by reason of the acts performed by him in the matter of the foreign insurance contract upon which the indictment is based, impaired his rights, as well as those of Mr. McKie, the assured, under the Constitution of the United States.

No business was done by the London Lloyds in Massachusetts, no contract was therein effected by them, the contract in question was not subject to the laws or jurisdiction of the State, the plaintiff in error was not an agent or representative in fact or law of the English underwriters, and what he did could not be made the subject of criminal punishment by the Legislature without violating the rights and securities guaranteed to him, as well as Mr. McKie, by the Fourteenth Amendment, as maintained in the brief in this case.

As this court, speaking by Mr. Justice Harlan, in *Minnesota vs. Barber* (136 U. S., 319), has said: "There may be no purpose upon the part of a legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, by its necessary operation, be destructive of rights granted or secured by the Constitution. In such cases, the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void." But the intended ultimate effect of the legislation under review, as enforced against the plaintiff in error, in this case, is to deprive the citizens of the right to contract outside of the State for the insurance of their property—a right

which State legislation cannot impair. The legislation, therefore, is not due process of law as applied to any citizens of the State, and cannot be justified by the acknowledged right of the Commonwealth to enact such legislation in the legitimate exercise of its police or other powers as to it may seem proper. In the exercise of such right, this court has declared, "care must be taken not to infringe upon those other rights of the citizen which are protected by the Federal Constitution" (*Allgeyer vs. Louisiana*, 165 U. S., 591).

J. HUBLEY ASHTON,
Of Counsel for Plaintiff in Error.

No. 212.

Filed Apr. 9, 1901.

Supreme Court of the United States.

No. 212. October Term, 1900.

CHARLES H. NUTTING, *Plaintiff in Error,*

v.

THE COMMONWEALTH OF MASSACHUSETTS.

In Error to the Superior Court of the Commonwealth of Massachusetts.

BRIEF FOR THE COMMONWEALTH.

HOSEA M. KNOWLTON,
Attorney-General.

ARTHUR W. DeGOOSH,
Assistant Attorney-General.

Supreme Court of the United States.

No. 212. October Term, 1900.

CHARLES H. NUTTING, Plaintiff in Error,

v.

COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR THE COMMONWEALTH.

Statement of the Case.

The plaintiff in error was indicted in the Superior Court of Massachusetts in March, 1899. The indictment charged that the defendant "at Boston . . . did act in the negotiation and transaction of unlawful insurance with a foreign insurance company, not admitted to do business in said Commonwealth, by then and there for one William McKie, of said Boston, negotiating with and procuring to be issued by divers certain individuals as insurers a certain contract and policy of insurance against loss upon a certain vessel of said McKie there situate, the said individuals then being associated, organized and engaged as principals in the business of insurance under and by authority of the government of the United Kingdom of Great Britain and Ireland, and said individuals not being then and there admitted to do insurance business in said Commonwealth according to law."

To this indictment the plaintiff in error pleaded not guilty. At the trial before the jury the facts were agreed in writing. The agreement is set forth in the record in this case on pages 5 and 6. Upon these facts the court instructed the jury, against the plaintiff in error's exceptions, that they would be warranted in finding him

guilty, and so they returned their verdict. Exceptions were also taken to the refusal of the court to give certain rulings prayed for by the defendant. (Exhibit C, record, pp. 6, 7). These exceptions were argued before the Supreme Judicial Court of Massachusetts, and a rescript was handed down sustaining the verdict. The case is reported in the Massachusetts Reports, vol. 175, p. 154. The opinion of the chief justice is printed in the record, on pages 18, 19 and 20.

It appears by the agreed statement of facts (record, page 5) that the plaintiff in error was a licensed insurance broker in Boston, and was the agent of Johnson & Higgins, average adjusters and insurance brokers, whose principal office was in New York, that, *in the course of his business as agent for them*, he solicited from William McKie, a ship builder in Boston, the business of procuring insurance upon a vessel then in process of construction by McKie in his ship-yard in Boston, and secured the authority of McKie to the placing of the insurance upon the vessel. He then sent the order for the insurance to Johnson & Higgins in New York, and they, through their Liverpool agents, procured the policy from the London Lloyds, insuring the vessel in favor of themselves, and "on account of whom it may concern, as well as in their own as for and in the name and names of all and every other person or persons to whom the same doth, may or shall appertain."

At the time of receiving the policy, Johnson & Higgins, through their Liverpool agents, advanced the premiums and were paid the commission on the insurance by the London Lloyds. They sent the policy by mail to the plaintiff in error at Boston, and the plaintiff in error then sent it by mail to McKie. The policy was secured for McKie from the London Lloyds for compensation in the usual course of the business of Johnson & Higgins and of the defendant.

The London Lloyds are individual insurers, citizens of England, engaged as principals in the business of insurance under the authority of the laws of England. They had not complied with the laws of Massachusetts, and were not admitted to do business therein.

STATUTES OF MASSACHUSETTS.

The statute of Massachusetts under which these questions are raised is St. 1894, c. 522, being an act to amend and codify the statutes relating to insurance.

Section 78 provides in substance, among other things, that no foreign insurance company shall be admitted to do business in Massachusetts until it has appointed an attorney, upon whom process in any suit against it may be served, and an agreement that process so served shall be of the same force and validity as if served upon the company; and has appointed some resident of the Commonwealth as its agent, and has obtained from the Insurance Commissioner a certificate that it has complied with the laws of the Commonwealth and is authorized to make contracts of insurance.

Sections 79 and 31 provide that a foreign marine insurance company, before doing business in Massachusetts, must deposit at least $300,000 with the treasurer of Massachusetts or with the financial officer of some other State, in exclusive trust for the benefit and security of all the company's policy holders and creditors in the United States.

Section 3 is in part as follows: "It shall be unlawful for any company to make any contract of insurance upon or concerning any property or interests or lives in this Commonwealth, or with any resident thereof, or for any person as insurance agent or insurance broker to make, negotiate, solicit, or in any manner aid in the transaction of such insurance, unless and except as authorized under the provisions of this act. . . . All contracts of insurance on property, lives or interests in this Commonwealth shall be deemed to be made therein."

Section 98 is as follows: "Any person who shall . . . act in any manner in the negotiation or transaction of unlawful insurance with a foreign insurance company not admitted to do business in this Commonwealth, or who as principal or agent shall violate any provision of this act in regard to the negotiation or effecting of contracts of insurance, shall be punished by a fine of not less than one hundred nor more than five hundred dollars for each offence."

Assignments of Error.

These are printed upon pages 15, 16 and 17 of the record.

The substantial contention of the plaintiff in error is that the statute upon which the plaintiff in error was convicted is unconstitutional, for the reason that it operates to deprive him of his liberty of action without due process of law, in that it interferes and restrains his right to make contracts and carry on business. Assignments 1, 4 and 5 further assert that the acts complained of were done without the State of Massachusetts, and are not, therefore, within the jurisdiction of the court.

Argument.

The form of the indictment, and the sufficiency of the evidence to support the material allegations of it, have been determined by the State court, and are not Federal questions.

Moore v. *Missouri*, 159 U. S. 673, 678.
Baldwin v. *Kansas*, 129 U. S. 52, 57.

The sole question before this court, therefore, is, whether the State has the right to prohibit persons from taking part *in the State*, by way of solicitation, negotiation or otherwise, in the making of a contract of insurance between a citizen of the State and a foreign insurance company, which has not been authorized to do business in the State.

The Commonwealth does not deem it of importance to discuss the question, so much dwelt upon by the plaintiff in error, whether the locus of the contract of insurance was within or without the State of Massachusetts. It is submitted, however, that a contract made with a resident of Massachusetts, relating to property in Massachusetts, and in which the inception and conclusion of the negotiation, and the delivery of the policy as well, took place in the State, is to be construed as made within the State.

But if the views of the Commonwealth as to the construction to be given to the particular statute upon which this indictment is founded, and of the principles upon which its constitutionality

should be upheld, are correct, it is of no consequence whether the contract of insurance be regarded upon the facts as having been entered into in London, New York or Boston.

For the same reasons, the Commonwealth does not discuss the question whether the statute (section 3, above quoted, providing that contracts of insurance upon property within the State are to be deemed to have been made in the State) is so repugnant to the Constitution of the United States as to render it void, further than to submit that it is a regulation designed to make effectual the general prohibition of insurance in the State by unauthorized foreign companies.

Furthermore, the Commonwealth does not deem it important to consider the question whether, on the facts agreed upon, the plaintiff in error is to be taken to have acted as the agent of the insured or of the insurer. What is agreed is, that he was a licensed insurance broker in Boston, and that in Boston, in the course of his business and acting *as agent for Johnson & Higgins of New York*, he solicited from William McKie the business of procuring insurance upon the vessel by a foreign company, and secured the authority of McKie to the placing of a contract for insurance upon said vessel by such foreign company. These and no other are the acts of the plaintiff in error complained of.

The statute under which the plaintiff in error was indicted does not pretend to prevent or make it criminal for a resident of Massachusetts to insure his property in whatever company he may desire. It only makes it a penal offence for an agent or broker to negotiate or in any manner aid in the transaction of insurance with a foreign insurance company not admitted to do business in Massachusetts. It is the doing of such acts which is in terms charged in the indictment.

This prohibition is plainly within the police power of the State Legislature. From the earliest times the States of the Union have regulated the insurance business. A contract of insurance is one in which, without due regulation, fraud and deception are easy, and the protection of the insured may become worthless. The consideration is paid in advance by the insured, and the contingent performance or

the contract by the insurer postponed to some date more or less remote. Whether it is insurance upon life or property, it is one of vital importance to the insured, and upon which he relies for the conduct of his affairs.

The business of insurance, therefore, so vitally touching the most important affairs of the citizen, has wisely been placed, in many States, including Massachusetts, under the direct supervision of officers appointed for that purpose, the whole purpose of such regulations being the protection of the insured.

Among other such regulations is one intended to prohibit foreign insurance companies from effecting insurance within the Commonwealth without being licensed to do business and complying with certain salutary conditions, among them being the appointment of an agent, who shall be empowered to receive service of process, so that a foreign company may be suable within the jurisdiction of the insured, and the making of a deposit with the State Treasurer, to secure policy holders. As an exercise of the police power, such regulations have frequently been upheld in this court as constitutional.

"There is no doubt of the power of the State to prohibit foreign insurance companies from doing business within its limits. The State can impose such conditions as it pleases upon the doing of any business by those companies within its borders, and unless the conditions be complied with the prohibition may be absolute."

Allgeyer v. *Louisiana*, 165 U. S. 578, 583.

See also, to the same effect —

Orient Ins. Co. v. *Daggs*, 172 U. S. 557.

N. Y. Life Ins. Co. v. *Cravens*, 178 U. S. 389.

The liberty of the citizen to make contracts of insurance outside the State, although he resides in the State, is not attempted to be abridged; but the liberty of an insurance agent to solicit insurance business for companies without the State is made a criminal offence. If this be an interference with the liberty of the citizen, it is only such interference as is justified in innumerable cases by State jurisdiction, in the exercise of its power to make wise and salutary laws for the

protection of its citizens. The liberty of action secured by the Fourteenth Amendment means only such liberty of action as is not inconsistent with salutary laws passed for the protection of citizens generally, and to which all persons alike are subject. Statutes prohibiting the sale of intoxicating liquors, regulating the practice of medicine, requiring examination and license before carrying on certain occupations like that of pharmacists and auctioneers, statutes forbidding the keeping or selling of dangerous substances like gun powder, excepting under certain restrictions, are common instances of laws universally in force, not intended to prohibit freedom of action by the citizen or abridging his rights, but only subjecting him to salutary regulations for the benefit of the community.

If a State has the right to prohibit the placing of insurance within its borders by foreign companies who do not care to comply with the conditions prescribed by the State for doing business therein, it also has the right to enact regulations whose object is to prevent the evasion or nullification of such laws by indirect methods and subterfuges.

The State of Massachusetts has the right to prohibit foreign companies from doing business in this State without a license; as a means of giving effect to such prohibition, it must have the right to prevent those who are not licensed to act as insurance brokers from soliciting such business; otherwise the law would be of no value, and the State would be powerless to prevent the very thing it has the right to prohibit.

In the words of Mr. Justice White, in *Hooper* v. *California:* "If the contention of the plaintiff in error were admitted, the established authority of the State to prevent a foreign corporation from carrying on business within its limits, either absolutely or except upon certain conditions, would be destroyed. It would be only necessary for such a corporation to have an understanding with a resident that in the effecting of contracts between itself and other residents of the State he should be considered the agent of the insured persons, and not of the company. This would make the exercise of a substantial and valuable power by a State government depend not on the actual facts of the transactions over which it law-

fully seeks to extend its control, but upon the disposition of a corporation to resort to a mere subterfuge in order to evade obligations properly imposed upon it. Public policy forbids a construction of the law which leads to such a result, unless logically unavoidable."

Hooper v. *California*, 155 U. S., 648, 658.

The plaintiff in error will undoubtedly rely upon *Allgeyer* v. *Louisiana*, 165 U. S. 578. The case, however, is not in point. The statute of Louisiana upon which the proceeding in that case was begun undertook to prohibit citizens of the State of Louisiana from negotiating insurance with a foreign company. The facts show that the defendant, a citizen of Louisiana, made a contract in New York with a foreign company for insurance of his property within the State.

That case holds that the State has no right to prohibit its citizens from carrying on business beyond the borders of the State as he may please. This is the whole doctrine of *Allgeyer* v. *Louisiana*, and it has no application to the present case.

But it may be contended that, inasmuch as a citizen may go abroad for his insurance, he may also request another to make such a contract for him.

In the first place, however, the defendant did not act solely (if at all) as the agent of McKie. Whatever his relations with McKie may have been, the facts find that he was a duly licensed insurance broker, and was the agent of Johnson & Higgins, also insurance brokers, and what he did in the way of effecting the insurance in question he did *in the usual course of his business, as such*. To say that, in this case, he was merely acting as the agent of McKie, is not only a mere subterfuge, but is less than the whole truth, — that he was acting in his capacity of insurance broker.

Furthermore, this contention is effectually disposed of by a paragraph of the opinion in *Hooper* v. *California*, 155 U. S. 648, and quoted with italicised approval by Mr. Justice White in *Allgeyer* v *Louisiana*, 165 U. S. 578, 588, — a paragraph which seems to have had the only contention of the present plaintiff in error in view: "The Fourteenth Amendment, however, does not guarantee the citizen *the right to make within his State, either directly or indi-*

rectly, a contract, the making whereof is constitutionally forbidden by the State. The proposition that, because a citizen might make such a contract for himself beyond the confines of his State, therefore he might authorize an agent to violate in his behalf the laws of his State, within her own limits, involves a clear non sequitur, and ignores the vital distinction between acts done within and acts done beyond a State's jurisdiction."

The Commonwealth is unable to discover any substantial difference between the facts of this case and those in *Hooper* v. *California*, 155 U. S. 648. The language of the majority opinion is precisely in point, and, it is submitted, disposes of every contention of the plaintiff in error. The authority of the case has been recognized in every subsequent decision, particularly in *Allgeyer* v. *Louisiana*, *ubi supra*.

The contention that the broker is protected because the insurance was procured for the resident from a foreign company is disposed of in the opinion in these words (p. 657): "The admission that the insurance was procured for the resident from a foreign company, which had no agent in the State, does not exclude the possibility of its having been procured within the State. If it were obtained for the resident by a broker who was himself a resident, this would be a procuring within the State, and be covered by the statute. The business of a broker is to serve as a connecting link between the party who is to be insured and the party who is to do the insuring, — to bring about 'the meeting of their minds,' which is necessary to the consummation of the contract. In the discharge of his business he is the representative of both parties to a certain extent."

The distinction between this case and that of *Allgeyer* v. *Louisiana* is clear, and is plainly indicated in the opinion in that case.

It may further be contended by the plaintiff in error that the use of the word "unlawful," in the clause, "in the negotiation or transaction of unlawful insurance with a foreign insurance company," in section 98, and which is repeated in the indictment, takes the case out of the doctrine of *Hooper* v. *California*, for the reason that the insurance, having been effected in a foreign jurisdiction, was not unlawful insurance.

It is obvious, however, that the word "unlawful" as used in the

statute is to be taken to mean insurance prohibited by section 3, the material language of which is quoted above.

As is said by Chief Justice Holmes, in the case in the State court, "Whether the description of the insurance in the indictment as unlawful is to be rejected as surplusage, or whether the insurance be held to be unlawful within the meaning of the act and indictment because transacted through a broker acting unlawfully, an offence under the statute is set forth, and the defendant properly was convicted."

As to this matter, the determination of the State court is final, and cannot be reviewed in the Federal court.

HOSEA M. KNOWLTON,
Attorney-General of Massachusetts.

ARTHUR W. DEGOOSH,
Assistant Attorney-General.

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Commonwealth of Massachusetts.

LAWS

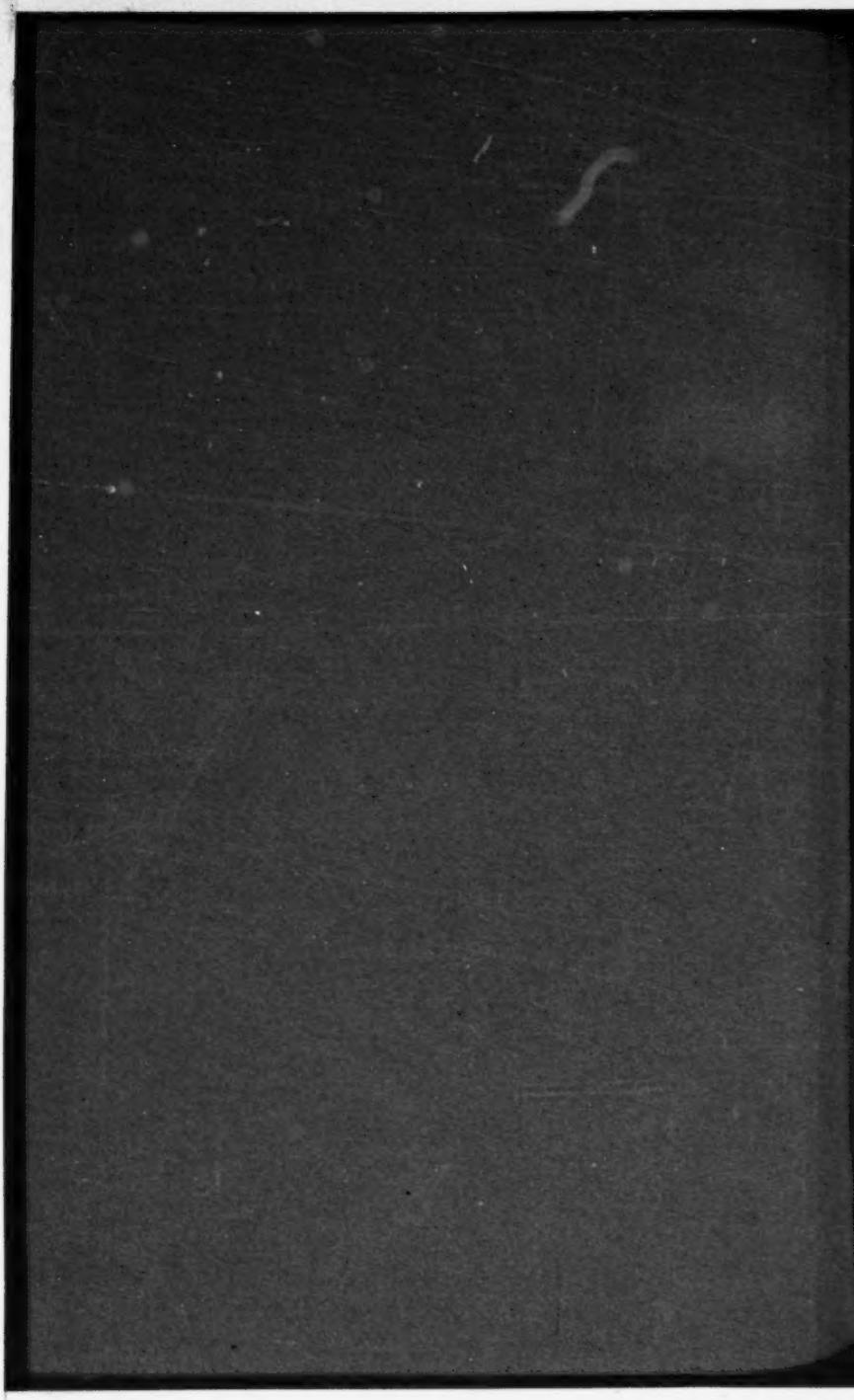
RELATING TO INSURANCE

AND

INSURANCE COMPANIES.

APRIL, 1900.

BOSTON:
WRIGHT & POTTER PRINTING CO., STATE PRINTERS,
18 POST OFFICE SQUARE.
1900.



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INSURANCE DEPARTMENT, BOSTON, April 1, 1900.

The laws herein contained apply to all kinds of insurance authorized to be transacted in the Commonwealth of Massachusetts except casualty insurance upon the assessment plan and the business of fraternal beneficiary organizations.

FRED'K L. CUTTING,
Insurance Commissioner.

Commonwealth of Massachusetts.

CHAPTER 522, ACTS OF 1894.

[As amended by subsequent acts.]

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. This act may be cited as the Massachusetts Insurance Act of eighteen hundred and ninety-four. When consistent with the context and not obviously used in a different sense the term "company", or "insurance company", as used herein, includes all corporations, associations, partnerships or individuals engaged as principals in the business of insurance; the word "domestic" designates those companies incorporated or formed in this Commonwealth, and the word "foreign", when used without limitation, includes all those formed by authority of any other state or government; the terms "unearned premiums", and "reinsurance reserve", and "net value of policies", or "premium reserve", severally intend the liability of an insurance company upon its insurance contracts, other than accrued claims, computed by rules of valuation established by section eleven; by the term "net assets" is meant the funds of an insurance company available for the payment of its obligations in Massachusetts, including, in the case of a mutual fire company, its deposit notes or other contingent funds, and, in the case of a mutual marine or mutual fire and marine company, its subscription fund and premium notes absolutely due, and also including uncollected and deferred premiums not more than three months due, on policies actually in force, after deducting from such funds all unpaid losses and claims, and claims for losses, and all other debts and liabilities inclusive of policy liability and exclusive of capital; the "profits" of a mutual insurance company are that portion of its cash funds not required for payment of losses and expenses nor set apart for any purpose allowed by law.

Short title of act.

Definition of words and phrases used in act.

SECTION 2. All insurance companies now or hereafter incorporated or formed by authority of any general or special law of

Companies subject to act.

Exceptions.

this Commonwealth, except corporations formed under or subject to chapter three hundred and sixty-seven of the acts of the year eighteen hundred and ninety-four and acts amendatory thereof, and except companies formed under or subject to chapter four hundred and twenty-one of the acts of the year eighteen hundred and ninety and acts amendatory thereof, may exercise the powers and shall be subject to the duties and liabilities provided by this act. And the general court may, for any cause it deems sufficient, annul or dissolve any such corporation or revoke its charter, and may amend or repeal the laws affecting the powers and obligations of such corporations.

General court may dissolve corporation or amend charter. P. S. 119, § 39.

Definition of insurance. 105 Mass. 149. 1897, c. 66.

SECTION 3. A contract of insurance is an agreement by which one party for a consideration promises to pay money or its equivalent or to do some act of value to the assured upon the destruction, loss or injury of something in which the other party has an interest, and it shall be unlawful for any company to make any contract of insurance upon or concerning any property or interests or lives in this Commonwealth, or with any resident thereof, or for any person as insurance agent or insurance broker to make, negotiate, solicit, or in any manner aid in the transaction of such insurance, unless and except as authorized under the provisions of this act: *provided*, that corporations formed under chapter three hundred and sixty-seven of the acts of the year eighteen hundred and ninety-four and acts amendatory thereof may make provision for and pay benefits to their members and to the widows, orphans, relatives and other dependents of deceased members in the mode provided in said chapter; and *also provided*, that nothing herein shall affect the rights or powers of corporations engaged in the transaction of life and casualty insurance upon the assessment plan, under the authority of chapter four hundred and twenty-one of the acts of the year eighteen hundred and ninety, to transact the business authorized by said chapter. All contracts of insurance on property, lives or interests in this Commonwealth shall be deemed to be made therein.

Unlawful to negotiate or make contracts of insurance otherwise than as herein authorized.

Exceptions.

Contracts to be governed by Massachusetts laws.

DEPARTMENT AND COMMISSIONER OF INSURANCE.

Insurance commissioner. Appointment and tenure of office.

SECTION 4. The department of insurance shall remain as now established. Its chief officer, appointed by the governor with the advice and consent of the council, shall be styled the insurance commissioner for the Commonwealth, and shall hold

his office for the term of three years from the date of his commission and until his successor is appointed and qualified, unless sooner removed by the governor. He shall give bond with sureties in the sum of ten thousand dollars, to be approved by the treasurer of the Commonwealth, for the faithful discharge of his duties, and shall receive in full compensation for his services an annual salary of thirty-five hundred dollars.

Official bond.

Compensation. P. S. 119, § 2. 1890, c. 247.

POWERS AND DUTIES OF THE COMMISSIONER.

SECTION 5. The commissioner shall exercise the powers and perform the duties conferred and imposed upon him by this act or by any other law of the Commonwealth. He may with the approval of the governor and council appoint, and with their consent remove, a deputy commissioner to assist him in his duties, who shall receive an annual salary of twenty-five hundred dollars. In the event of a vacancy in the office of commissioner or during the absence or disability of that officer the deputy commissioner shall perform the duties of the office. The commissioner may also appoint, in the same manner in which under the provisions of law he may appoint a deputy commissioner, an examiner for the insurance department, at an annual salary of two thousand dollars. The commissioner may employ in his department an actuary with an annual salary of two thousand dollars, a chief clerk with an annual salary of two thousand dollars, a second clerk with an annual salary of fifteen hundred dollars, a third clerk with an annual salary of twelve hundred dollars, and such additional clerks and assistants as the public business in his charge may require, at an expense not to exceed such sum as the general court may appropriate each year.

Deputy commissioner, compensation. P. S. 119, § 3.

To act as commissioner in case of vacancy, etc. 1896, c. 335.

Actuary, 1895, c. 81.

Clerks and assistants. Their compensation. 1886, c. 137. 1888, c. 84.

QUALIFICATION AND EXAMINATION OF COMPANIES.

SECTION 6. Before granting certificates of authority to an insurance company to issue policies or make contracts of insurance he shall be satisfied, by such examination and evidence as he sees fit to make and require, that such company is otherwise duly qualified under the laws of the Commonwealth to transact business therein.

Commissioner shall examine companies as to their qualification under the laws.

As often as once in three years he shall personally or by his deputy, examiner, or chief clerk, visit each domestic insurance company, and thoroughly inspect and examine its affairs, especially as to its financial condition and ability to fulfil its

To visit and examine domestic companies every three years, or oftener if expedient, or upon request of

stockholders, etc. P. S. 119, § 6. 1883, c. 225. 1897, c. 67.

obligations and whether it has complied with the laws. He shall also make an examination of any such company whenever he deems it prudent to do so or upon the request of five or more of the stockholders, creditors, policy-holders or persons pecuniarily interested therein who shall make affidavit of their belief, with specifications of their reasons therefor, that such company is in an unsound condition.

To visit and examine foreign companies when he deems it expedient.

Whenever he deems it prudent for the protection of policyholders in this Commonwealth, he shall in like manner visit and examine or cause to be visited and examined by some competent person or persons he may appoint for that purpose any foreign insurance company applying for admission or already admitted to do business by agencies in this Commonwealth, and such company shall pay the proper charges incurred in such examination, including the expenses of the commissioner or his deputy and the expenses and compensation of his assistants employed therein.

Expenses of examination. P. S. 119, § 7.

His powers in examinations. P. S. 119, §§ 8, 9, 10.

For the purposes aforesaid the commissioner or his deputy or person making the examination shall have free access to all the books and papers of an insurance company that relate to its business, and to the books and papers kept by any of its agents, and may summon and qualify as witnesses under oath and examine, the directors, officers, agents and trustees of any such company and any other persons, in relation to its affairs, transactions and condition.

May summon and examine witnesses. Penalty. See § 108.

UNSOUND AND DELINQUENT COMPANIES.

If foreign company is unsound or in default, he shall revoke or suspend its authority to do business. P. S. 119, § 13.

If foreign company has failed to comply, commissioner shall revoke or suspend authority.

SECTION 7. If he is of opinion upon examination or other evidence that a foreign insurance company is in an unsound condition, or if a life insurance company, that its actual funds exclusive of its capital are less than its liabilities; or if a foreign insurance company has failed to comply with the law, or if it, its officers or agents refuse to submit to examination or to perform any legal obligation in relation thereto, he shall revoke or suspend all certificates of authority granted to it or its agents, and shall cause notifications thereof to be published in the newspaper in which the general laws are published, and no new business shall thereafter be done by it or its agents in this Commonwealth while such default or disability continues, nor until its authority to do business is restored by the commissioner: *provided*, *however*, that unless the ground for revocation or sus-

pension relates only to the financial condition or soundness of the company, or to a deficiency in its assets, he shall notify the company not less than ten days before revoking its authority to do business in this Commonwealth; and he shall specify in the notice the particulars of the supposed violation. The supreme judicial court upon petition of said company, brought within the ten days aforesaid, shall summarily hear and determine the question whether such violation has been committed, and shall make any proper order or decree therein and enforce the same by any appropriate process. If the order or decree is adverse to the petitioning company, an appeal therefrom may be taken to the full court; and in the case of such appeal the commissioner may issue his order revoking the right of said petitioning company to do business in this Commonwealth until the final determination of the question by the full court aforesaid. Neither this act nor any proceedings thereunder shall affect any criminal prosecution or proceeding for the enforcement of any fine, penalty or forfeiture.

Supreme court shall summarily hear and determine the question.

An appeal may be taken.

If, upon examination, he is of opinion that any domestic insurance company is insolvent, or has exceeded its powers, or has failed to comply with any provision of law, or that its condition is such as to render its further proceedings hazardous to the public or to its policy-holders, he shall apply to a justice of the supreme judicial court to issue an injunction restraining it in whole or in part from further proceeding with its business. Such justice may, in his discretion, issue the injunction forthwith, or upon notice and hearing thereon, and after a full hearing of the matter may dissolve or modify such injunction or make it perpetual, and may make all orders and decrees needful in the premises, and may appoint agents or receivers to take possession of the property and effects of the company and to settle its affairs subject to such rules and orders as the court may from time to time prescribe, according to the course of proceedings in equity.

Shall apply for injunction in case of insolvency, etc., of a domestic company. P. S. 119, §§ 14, 15.

Powers of court.

Section 8. Whenever it appears to him that the capital of a domestic insurance company is impaired to the extent of one fourth or more, on the basis fixed in section eleven, he shall notify the company that its capital is legally subject to be made good in the mode provided by section thirty-five, and if such company shall not within three months after such notice satisfy him that it has fully repaired its capital, or reduced its

Shall notify domestic company to make good its capital when impaired twenty-five per cent.

To apply for injunction if notice not complied with.

capital, as provided in section thirty-seven, he shall institute proceedings against it in accordance with the preceding section.

To notify domestic life company to cease business when its funds are deficient. See § 66. P. S. 119, § 155.

SECTION 9. When the actual funds of a domestic life insurance company, exclusive of its capital, are not of a net cash value equal to its liabilities, including the net value of its policies computed by the rule of valuation established by section eleven, he shall notify such company and its agents to issue no new policies until its funds become equal to its liabilities.

To report violations of law to attorney-general. P. S. 119, § 16.

SECTION 10. If upon examination or other evidence exhibited to him he is of opinion that any insurance company, or an officer or agent thereof, has violated any provision of this act, he shall report the facts to the attorney-general, who shall cause such company, officer or agent to be prosecuted therefor.

VALUATION OF LIFE POLICIES. REINSURANCE RESERVE. ASSETS.

To value policies of life companies annually. Rule of valuation. 1856, c. 252. 1861, c. 186. P. S. 119, §§ 17, 155, 159.

SECTION 11. He shall each year compute the net value on the thirty-first day of December of the preceding year of all outstanding policies of life insurance in companies authorized to make insurance on lives in this Commonwealth upon the basis of the "Combined Experience" or "Actuaries' Table" rate of mortality, with the interest at four per cent. per annum, and the aggregate net value so ascertained, of the policies of any such company shall be deemed its liability on account of its policy obligations, other than accrued claims, to provide for which it shall hold funds in secure investments of an amount equal to such net value above all its other liabilities. When the actual premium charged by a company for an insurance is less than the net premium for such insurance, computed according to the table of mortality and rate of interest aforesaid, then, and in every such case, the company shall be charged as a separate liability with the value of an annuity, the amount of which shall equal the difference between the premiums aforesaid, and the term of which in years shall equal the number of future annual payments due on said insurance at the date of the valuation.

Rule for computation of reserve for reinsurance, or policy liability. P. S. 119, § 11. 1883, c. 126. 1884, c. 178.

To determine the liability upon its contracts of insurance of an insurance company, other than life and real estate title insurance, and thence the amount such company shall hold as a reserve for reinsurance, he may take fifty per cent. or the actual unearned portion of the premiums written in its policies; but in respect to marine risks he shall compute the liability thereon by charging sixty per cent. of the amount of premiums written

in its policies upon yearly risks, and upon risks covering more than one passage not terminated, and the full amount of premiums written in policies upon all other marine risks not terminated: *provided*, that in the case of foreign fire and marine insurance companies with less than three hundred thousand dollars capital admitted to transact fire insurance only in this Commonwealth, the full amount of premiums written in their marine and inland navigation and transportation insurance policies shall be charged as liability.

Valuation of assets of life companies.

In valuing the assets which compose the legal reserve of a life insurance company the real estate, the bonds and stocks, shall be taken at such a value that the average annual income thereof shall be not less than four per cent. of the valuation; and if any asset or investment is conditioned upon a rate of interest of less than four per cent. annually, such asset or investment shall be rated at its value, considering the actual income and time it has to run, as the equivalent of a four per cent. investment; loans and credits shall not be allowed for more than their face value, nor shall any asset or investment be appraised for more than its market value.

What assets are admissible.

He shall allow to the credit of an insurance company in the account of its financial condition only such assets as are immediately available for the payment of losses in Massachusetts, but may credit any deposits or funds of the company set apart as security for a particular liability in set-off to the amount charged on account of such liability.

P. S. 119, § 64.

He shall not allow stockholders' obligations of any description as part of the assets or capital of any stock insurance company, unless the same are secured by competent collateral.

Shall examine and certify proceedings of companies to increase or reduce capital. See §§ 35, 36, 37.

SECTION 12. He shall, upon application, examine the proceedings of domestic companies to increase or reduce their capital stock, and when found conformable to law shall indorse certificates thereof, and shall issue certificates of authority to such companies to transact business upon such increased or reduced capital.

ACCOUNTS, ETC., OF RECEIVERS.

To audit the accounts of receivers of insolvent companies, and report to the court.

SECTION 13. He or his deputy or examiner shall annually, and oftener if there seems occasion, examine the accounts and transactions of all receivers of insolvent insurance companies, and shall also carefully examine all accounts of such receivers

referred to him under the provisions of section ninety-five, and make report thereof to the court.

May examine receivers and their books and papers.

For the above purposes he or his deputy or examiner shall have free access to the official books and papers of such receivers relative to their transactions, and may examine such receivers under oath as to all matters connected therewith.

Shall certify misconduct of receiver, and uselessness of proceedings to collect assessment. P. S. 119, §§ 170-172. 1896, c. 53.

Whenever in his opinion any receiver has violated his duty in office, or further proceedings by receivers to collect an assessment will not offer substantial relief to creditors, the commissioner shall certify the facts to the court having jurisdiction of the proceedings.

SUITS AGAINST FOREIGN COMPANIES.

To act as attorney for foreign companies for service of lawful process.

SECTION 14. When legal process is served upon him as attorney for a foreign company under the provisions of the third clause of section seventy-eight he shall forthwith notify the company of such service by letter prepaid and directed to its secretary, or in the case of a company of a foreign country to its resident manager, if any, in the United States; and shall within two days after such service forward in the same manner a copy of the process served on him to such secretary or manager, or to such other person as may have been previously designated by the company by written notice filed in the office of the commissioner. As a condition of valid and effectual service, and of the duty of the commissioner in the premises, the plaintiff in each such process shall pay to the commissioner at the time of service thereof the sum of two dollars, which the said plaintiff shall recover as taxable costs if he prevails in his suit. The commissioner shall keep a record of all such processes, which shall show the day and hour of service.

To give notice and keep record of processes. P. S. 119, §§ 202, 203.

FEES AND CHARGES.

Shall collect fees for valuing life policies, etc. 1894, c. 19.

SECTION 15. He shall collect and pay into the treasury charges and fees as follows: for valuation of life policies, two and one half mills for each thousand dollars of insurance; for each examination of a domestic company's qualification to transact business, thirty dollars; of each foreign company for filing copy of charter or deed of settlement, thirty dollars, and for filing statement with application for admission and for each annual statement, twenty dollars; for each license to procure fire insurance in unauthorized foreign companies, twenty dollars annually; for

each certificate to an insurance broker, ten dollars; for each certificate or renewal thereof to an insurance agent, two dollars; for each certificate of the valuation of the policies of any life insurance company and for each certificate of the examination, condition or qualification of an insurance company, two dollars; for each service of lawful process upon him as attorney, two dollars; for each copy of any paper on file in his office, twelve cents a page and one dollar for certifying the same; and all other fees and charges due and payable into the treasury for any official act or service of the commissioner.

BLANKS FOR STATEMENTS AND RETURNS.

SECTION 16. He shall in December of each year furnish to each of the insurance companies authorized to do business in the Commonwealth, two or more blanks in form adapted for their annual statements.

Shall furnish blanks for annual statements.

RECORD AND ANNUAL REPORT.

SECTION 17. He shall keep and preserve in a permanent form a record of his proceedings, including a concise statement of the result of official examination of insurance companies.

Shall keep a record of his transactions. P. S. 119, § 20.

He shall annually, and as early as consistent with full and accurate preparation, make a report to the general court of his official transactions, and shall include in such report a statement of the receipts and expenditures of his department for the preceding year; a report of the condition of the receiverships of insolvent companies; an exhibit of the financial condition and business transactions of the several insurance companies as disclosed by official examinations of the same or by their annual statements, abstracts of which statements, together with his valuation of life policies, shall appear therein; and such other information and comments in relation to insurance and the public interest therein, as he deems fit to communicate.

Shall make annual report to the legislature. P. S. 119, § 21.

[The insurance commissioner of the Commonwealth shall forthwith transmit to each register of probate and insolvency a list of all corporate surety companies qualified to do business in this Commonwealth so as to become sureties on bonds, and whenever new companies become qualified so to do business, or the right of qualified companies so to do business has ceased in this Commonwealth, the names of such companies shall

forthwith be transmitted by the insurance commissioner to said registers.] Chap. 54, Acts of 1898.

PROVISIONS COMMON TO ALL COMPANIES.

To do business and issue policies in corporate name. P. S. 119, § 178.

SECTION 18. Every insurance company, foreign or domestic, shall conduct its business in the Commonwealth in its own proper and corporate name, and the policies and contracts of insurance issued by it shall be headed or entitled only by its proper or corporate name.

Liabilities to be published with assets. P. S. 119, § 179. Penalty. See § 100.

When any such company publishes its assets it shall in the same connection and with equal conspicuousness publish its liabilities computed on the basis allowed for its annual statements, and any publication purporting to show its capital shall exhibit only the amount of such capital as has been actually paid in cash. Such publications shall be held to include all policies, renewals, signs, circulars, cards or other means by which public announcements are made.

Liable to taxation; to make returns for assessment of taxes. P. S. 119, § 45.

SECTION 19. Every such company shall be liable to taxation by any general law taxing insurance companies, and it shall by its proper officers make, to the tax commissioner or other officer of the Commonwealth, such returns and statements of its business and affairs as the law may require for the purpose of assessment of such taxes, and thereupon its officers and agents may be examined under oath by the officer to whom such returns are to be made.

Reinsurance shall be reported at time of filing annual statement. 1892, c. 47

SECTION 20. If any company authorized to transact the business of insurance in this Commonwealth shall directly or indirectly contract for or effect any reinsurance of any risk or part thereof taken by it, it shall make a sworn report thereof to the insurance commissioner at the time of filing its annual statement, or at such other time as he may request; and such reinsurance, except so far as it is in companies authorized to do business in this Commonwealth, shall not reduce the reserve required of it or the taxes to be paid by it, or increase the amount it is authorized to have at risk in any town or fire insurance district.

Reinsurance not to reduce reserve

Limit of single hazard. P. S. 119, §§ 56, 197. 1895, c. 59. Penalty. See § 103.

No insurance company shall insure in a single hazard a larger sum than one tenth of its net assets: *provided, however*, that a mutual boiler insurance company of this Commonwealth may insure in a single risk an amount not exceeding one fourth of its net assets.

[Consult chap. 537, Acts of 1898, relative to reinsurance contracts, page 69.]

Misrepresentation by assured not to avoid policy unless. P. S. 119, § 181. 1895, c. 271.

SECTION 21. No oral or written misrepresentation or warranty made in the negotiation of a contract or policy of insurance, by the assured or in his behalf, shall be deemed material or defeat or avoid the policy, or prevent its attaching, unless such misrepresentation or warranty is made with actual intent to deceive, or unless the matter misrepresented or made a warranty increased the risk of loss.

PROVISIONS SPECIAL TO MASSACHUSETTS COMPANIES.

Subject to general corporation law. P. S. 105, § 1.

SECTION 22. The general provisions of law relative to the powers, duties and liabilities of corporations shall apply to all incorporated domestic insurance companies, so far as such provisions are pertinent and not in conflict with other provisions of law relative to such companies or with their charters.

All insurance companies of this Commonwealth may be governed by this chapter, anything in their special charters to the contrary notwithstanding, providing notice of the acceptance of said act is filed with the insurance commissioner.

To continue bodies corporate after expiration of charter limitation.

SECTION 23. Domestic insurance companies incorporated by special acts, whose charters are subject to a limitation of time, shall after such limitation expires continue to be bodies corporate, subject to all general laws applicable to such companies.

To obtain certificate from commissioner before issuing policies. P. S. 119, § 5. 1897, c. 67.

SECTION 24. No domestic insurance company shall issue policies until upon examination by the commissioner, his deputy or examiner, it is found to have complied with the laws of the Commonwealth, nor until it has obtained from the commissioner a certificate setting forth that fact and authorizing it to issue policies. For such examination it shall pay into the treasury of the Commonwealth thirty dollars.

May adopt by-laws and divide directors into classes. P. S. 119, § 43. 1894, c. 74.

SECTION 25. Any such company may adopt by-laws for the conduct of its business not repugnant to law or to its charter, and therein may provide for the division of its board of directors into two, three or four classes, and the election thereof at its annual meetings in such manner as that the members of one class only shall retire and their successors be chosen each year. Vacancies in any such class may be filled by election by the board for the unexpired term.

Secretary and treasurer to give bond. P. S. 119, § 41.

The secretary and treasurer shall severally give bond with sureties in such sum as the directors may require for the faithful performance of their respective duties.

Call for meetings. P. S. 119, § 42.

All matters proposed to be acted upon at any meeting of the company shall be specified in the call for the same.

[No fire insurance company chartered under any law of this Commonwealth shall establish any agencies or appoint any agents or other persons to solicit or transact business for it in any state until said corporation has been lawfully authorized to transact business therein, nor shall any such corporation pay or allow any commission or emolument to any person whatsoever within any state to which it has not been lawfully admitted for the solicitation or procurement of insurance upon property therein.

For any violation of the preceding section the company shall be punished by a fine of not less than three hundred dollars.] Chap. 186, Acts of 1897.

Investments to be in corporate name.

All investments of the funds of the company shall be made in its corporate name, and no officer of the company and no member of a committee thereof charged with the duty of investing its funds shall borrow the same or be directly or indirectly liable for or on account of loans thereof to others; nor shall any director or other officer take or receive to his own use any fee, brokerage, commission, gift or other consideration for or on account of a loan made by or on behalf of such company.

Officers not to borrow, or to act as brokers of loans. P. S. 119, §§ 46, 47.

Policies to be signed, etc. P. S. 119, § 56.

All policies issued by such company shall be signed by its secretary or in his absence by a secretary *pro tempore*, and by its president or vice president, or in their absence by two directors.

Office for business; cards, etc., to specify location. P. S. 119, § 44.

Such companies shall have their office in the city or town specified in their charter; and when they establish agencies in other cities or towns, all signs, cards, pamphlets and advertisements exhibited or issued by them shall specify the city or town where the company they represent is located.

Shall not trade except, etc., nor engage in other business. P. S. 119, § 49.

They shall not deal or trade in buying or selling goods, wares or merchandise, except articles insured by them on which losses are claimed, and except in replacing, rebuilding or repairing insured property, as provided in their policies, nor engage in any business other than as specified in their charters and articles of association and expressly authorized by law.

May hold certain real estate and no other. P. S. 119, § 36.

Any such company may acquire and hold real estate for the convenient accommodation of its business at a cost not exceeding twenty-five per cent. of its cash assets, and not otherwise,

but may hold real estate acquired under the conditions of any mortgage owned by it, or by purchase or set-off on execution, upon judgment for debts due it in the course of its legitimate business.

Venue and limitations of suits. P. S. 119, § 43.

SECTION 26. No such company shall make any condition or stipulation in its insurance contracts concerning the court or jurisdiction wherein any suit thereon may be brought, nor shall limit the time within which such suit may be commenced, to less than two years after the cause of action accrues, and any such condition or stipulation shall be void.

Mortgages held by, how taken on execution. P. S. 119, § 48.

SECTION 27. Mortgages on real estate held by a domestic insurance company may be attached and taken and sold on execution, in the manner provided in chapter one hundred and eighteen of the Public Statutes in respect to mortgages held by banks, and the secretary of the company shall perform in reference thereto the same duties required of cashiers and clerks of banks.

Corporate powers to cease, when. P. S. 119, §§ 24, 37, 50.

SECTION 28. If any domestic insurance company shall not commence to issue policies within one year after the date of its act of incorporation or of its certificate of organization, or if after it has commenced to issue policies it shall cease for the period of one year to make new insurances, its corporate powers shall expire by their own limitation, and the supreme judicial court upon petition of the insurance commissioner or of any person interested may fix by decree the time within which it shall settle and close its concerns. A company incorporated by special act shall, within one year from the date thereof, file with the secretary of the Commonwealth a written notice of its organization under its charter, or the same shall be void.

Charters of Massachusetts life companies shall not limit investments. 1838, c. 165.

Nothing in the charter of any mutual life insurance company incorporated under the laws of the Commonwealth shall limit the investments of such company unless such limitation be contained in the general insurance laws which now are or which may hereafter be in force.

1895, c. 46. 1897, c. 64.

Every corporation heretofore or hereafter chartered under the laws of this Commonwealth to transact the business of insurance of any kind shall file with the insurance commissioner the name and residence of each person it appoints or employs to act as its agent in Massachusetts; and whoever shall assume to act as such agent, or, unless a licensed broker, shall in any manner for compensation aid in negotiating contracts of insurance on

behalf of such corporation for a person other than himself, prior to the filing of such notice of appointment, shall be guilty of a misdemeanor, and upon conviction thereof shall be subject to the penalties of section one hundred and ten of this act.

ORGANIZATION OF INSURANCE COMPANIES.

Purposes for which companies may be formed. P. S. 119, §§ 28, 30, 31. 1894, c. 296.

SECTION 29. Insurance companies may be formed as provided in section thirty for any one of the following purposes, to wit: —

Loss by fire, lightning and tempest on land.

First, To insure against loss or damage to property by fire, lightning, or tempest on land, upon the stock or mutual plan.

Marine insurance.

Second, To insure upon the stock or mutual plan, vessels, freights, goods, money, effects, and money lent on bottomry or respondentia, against the perils of the sea and other perils usually insured against by marine insurance, including risks of inland navigation and transportation.

Fidelity and corporate suretyship. See § 61.

Third, To guarantee the fidelity of persons in positions of trust, private or public, and to act as surety on official bonds and for the performance of other obligations.

Damage by steam-boiler explosions.

Fourth, To insure against loss or damage to property of the assured, or loss or damage to the life, person or property of another for which the assured is liable, caused by the explosion of steam-boilers.

Accident to persons. 1894, c. 133.

Fifth, To insure any person against bodily injury or death by accident, or any person, firm or corporation against loss or damage on account of the bodily injury or death by accident of any person for which loss or damage said person, firm or corporation is responsible.

Plate glass.

Sixth, To insure against the breakage of plate glass, local or in transit.

Sprinkler insurance. 1895, c. 474.

Seventh, To insure against loss or damage by water to any goods or premises arising from the breakage or leakage of sprinklers and water pipes.

Vehicles, elevators. 1895, c. 474.

Eighth, To insure against loss or damage to property arising from accidents to elevators, bicycles and vehicles, except rolling stock of railways.

Credit insurance. 1896, c. 447.

Ninth, To carry on the business commonly known as credit insurance or guaranty, either by agreeing to purchase uncollectible debts, or otherwise to insure against loss or damage from the failure of persons indebted to the assured to meet their liabilities.

Tenth, [see sect. 62].

Sprinkler insurance by fire companies. 1896, c. 140.

All insurance companies authorized to transact fire insurance business in this Commonwealth may, in addition to the business which they are now authorized by law to do, insure sprinklers, pumps and other apparatus erected or put in position for the purpose of extinguishing fires, against damage, loss or injury resulting from accidental causes, other than fire; and may also insure any property which such companies are authorized to insure against loss or damage by fire, against damage, loss or injury by water or otherwise, resulting from the accidental breaking of or injury to such sprinklers, pumps or other apparatus, arising from causes other than fire. Contracts of insurance of the kind provided for in this paragraph shall not be incorporated in any contract of insurance against loss or damage by fire, but shall be contained in separate and distinct policies, the conditions of which shall be prescribed by the insurance commissioner for the Commonwealth.

Separate contracts. 1896, c. 140.

[All insurance companies authorized to transact fire insurance business in this Commonwealth may, in addition to the business which they are now authorized by law to do, insure property against loss by bombardment. Contracts of insurance of this kind shall not be incorporated in any contract of insurance against loss or damage by fire, but shall be contained in separate and distinct policies.] Chap. 380, Acts of 1898.

How organized. P. S. 119, §§ 28–29, 32–35.

Section 30. The procedure for organizing such a corporation shall be as follows: —

Corporators to subscribe articles of association.

The proposed corporators, who must be residents of the Commonwealth and not less than ten, shall subscribe articles of association setting forth their intention to form a corporation; its proposed name, which must not so closely resemble the name of an existing corporation as to be likely to mislead the public, and must be approved by the insurance commissioner; the class of insurance it proposes to transact and on what business plan or principle; the place, within the Commonwealth, of its location; and, if on the stock plan, the amount of its capital stock.

Contents of agreement of incorporation.

Corporate title.

The words "insurance company" must be a part of the title of any such corporation, and also the word "mutual" if it is organized upon the mutual principle.

First meeting for organization. How called and proceedings of.

The first meeting for the purpose of organization shall be called by a notice signed by one or more of the subscribers to the articles of association, stating the time, place and purpose of the meeting; a copy whereof shall, seven days at least be-

fore the appointed time, be given to each subscriber, or left at his usual place of business or residence, or duly mailed to his post-office address. And whoever gives such notice shall make affidavit thereof, which shall include a copy of the notice and be entered upon the records of the corporation.

Adoption of by-laws.

Election of officers.

At such first meeting, including any adjournment thereof, an organization shall be effected by the choice by ballot of a temporary clerk, who shall be sworn, by the adoption of by-laws, and by the election of directors and such other officers as the by-laws may require; but at such first meeting no person shall be elected director who has not signed the articles of association. The temporary clerk shall record the proceedings until and including the choice and qualification of the secretary.

The directors so chosen shall elect a president, secretary, and any other officers which under the by-laws they are authorized to choose.

Officers to make certificate to be approved by the insurance commissioner and filed with the secretary of the Commonwealth.

The president, secretary, and a majority of the directors, shall forthwith make, sign and swear to a certificate setting forth a copy of the articles of association, with the names of the subscribers thereto, the date of the first meeting and of any adjournments thereof, and shall submit such certificate and the records of the corporation to the insurance commissioner, who shall examine the same, and who may require such other evidence as he may judge necessary. The commissioner, if it appears that the requirements of the law as herein have been complied with, shall certify that fact, and his approval of the certificate, by indorsement thereon. Such certificate shall thereupon be filed by said officers in the office of the secretary of the Commonwealth, who, upon payment of a fee of twenty-five dollars, shall cause the certificate with the indorsement thereon to be recorded, and shall issue a certificate in the following form:

COMMONWEALTH OF MASSACHUSETTS.

Be it known that whereas [here the names of the subscribers to the articles of association shall be inserted] have associated themselves with the intention of forming a corporation under the name of [here the name of the corporation shall be inserted] for the purpose [here the purpose declared in the articles of association shall be inserted], with a capital [or with a permanent fund] of [here the amount of capital or permanent fund fixed in the articles of association shall be inserted], and have complied with the provisions of the statutes of this Commonwealth in such case made and provided, as appears from

the certificate of the president, secretary and directors of said corporation, duly approved by the insurance commissioner and recorded in this office: now, therefore, I [here the name of the secretary shall be inserted], secretary of the Commonwealth of Massachusetts, do hereby certify that said [here the names of the subscribers to the articles of association shall be inserted], their associates and successors, are legally organized and established as, and are hereby made an existing corporation under the name of [here the name of the corporation shall be inserted], with the powers, rights and privileges, and subject to the duties, liabilities and restrictions which by law appertain thereto. Witness my official signature hereunto subscribed, and the seal of the Commonwealth of Massachusetts hereunto affixed, this day of , in the year .
[In these blanks the day, month and year of execution of the certificate shall be inserted; and in the case of purely mutual companies, so much as relates to capital stock shall be omitted.]

Certificate of organization to have the force of a special charter, and be conclusive evidence of incorporation.

The secretary shall sign the same and cause the seal of the Commonwealth to be thereto affixed, and such certificate shall have the force and effect of a special charter and be conclusive evidence of the organization and establishment of such corporation. He shall also cause a record of such certificate to be made, and a certified copy of such record may be given in evidence with like effect as the original certificate.

Amount of Capital.

To do only the business specified in charter.

Minimum capital of stock companies. P. S. 119, § 29.

1895, c. 474. 1896, c. 447.

SECTION 31. No corporation so formed shall transact any other business than that specified in its charter and articles of association. Companies to insure plate glass may organize with a capital of not less than one hundred thousand dollars. Companies so formed insuring marine or inland risks upon the stock plan shall have a capital of not less than three hundred thousand dollars. Companies so formed for the transaction of fire insurance on the stock plan, of fidelity insurance, of accident insurance, of steam-boiler insurance, or for the transaction of the business authorized under the seventh, eighth or ninth paragraph of section twenty-nine of this act shall have a capital of not less than two hundred thousand dollars. Companies may be so formed to insure mechanics' tools and apparatus against loss by fire for an amount not exceeding two hundred and fifty dollars in a single risk, with a capital of not less than twenty-five thousand dollars, divided into shares of the par value of ten dollars each.

Employers' liability insurance. 1894, c. 133.

Mutual companies heretofore organized to transact employers' liability insurance may continue such business under the fifth paragraph of section twenty-nine of this act, and such companies shall be subject to the laws, so far as applicable, in relation to mutual fire insurance companies.

Deposits with state treasurer as capital.

No company shall be required to have on deposit with the treasurer of the Commonwealth an amount in excess of what is sufficient to enable it to comply with the laws of the states in which it transacts business; and all sums in excess of this amount held on deposit by the treasurer of the Commonwealth or elsewhere shall be counted as of the surplus funds of the company.

MASSACHUSETTS STOCK COMPANIES.

Officers, — their Election and Duties.

P. S. 119, §§ 51, 52, 53, 1854, c. 74. Election, eligibility and term of office of directors. 1906, c. 253.

Section 32. The board of directors of each domestic stock insurance company shall consist of not less than five members, chosen by ballot from stockholders a majority of whom shall be resident in this Commonwealth, who shall hold office for one year or for the term provided in its by-laws as authorized by section twenty-five, and until their successors are qualified.

Votes of stockholders.

In the choice of directors and at all meetings of the company each stockholder shall be entitled to one vote for each share he holds not in excess of one-tenth of the capital.

Proxies.

Proxies may be authorized by written power of attorney, but no officer shall vote as proxy.

Record and evidence of elections.

The record of the votes made by the secretary or clerk, which shall show whether the same were cast in person or by proxy, shall be evidence of all such elections.

Directors to accept.

The directors before they are qualified to act shall file with the secretary a written acceptance of the trust.

Quorum.

Not less than four shall constitute a quorum, and a majority of those in attendance may transact business.

Vacancies.

Vacancies in any office may be filled by the directors or by the stockholders as the by-laws shall provide.

Directors to elect president and other officers.

The directors shall annually choose by ballot a president, who shall be a member of the board, a secretary, and such other officers as the by-laws provide.

To call special meetings, when.

They may call special meetings of the stockholders whenever they deem proper, and shall call such meetings on the written application of the owners of one-fifth part of the capital, or of twenty shareholders, setting forth

the purposes of the same. They shall at each annual meeting of the company submit a full statement of the transactions of the company during the previous year, and of its financial condition.

To make statement at annual meetings.

The president and secretary, and vice-president, if there be one, shall annually be sworn, and their oaths entered of record in the company's books. The president, or in his absence the vice-president, if there be one, shall preside at all meetings of the directors or stockholders. In the absence of the president and vice-president a president *pro tempore* may be chosen.

Officers to be sworn.

President, etc., to preside at meetings of directors and stockholders.

The secretary shall keep a record of the votes and proceedings of all meetings of the directors and of the stockholders; a list of the stockholders and the number of shares standing in the name of each; a record of all transfers of shares and of all policies issued and all authorized assignments, cancellations, and transfers thereof; and such additional books as the president and directors require. The records so kept shall be evidence of the transactions to which they relate and open to the inspection of any person interested therein; and for making any wilfully false record the secretary shall be deemed guilty of the crime of perjury.

Secretary to keep record of votes, stockholders, policies, etc.

Personal Liability of Officers.

SECTION 33. The directors or other officer making or authorizing an investment or loan in violation of section thirty-four shall be personally liable to the stockholders for any loss occasioned thereby.

Officer making illegal investment, or issuing policies when company is insolvent, or making over-insurance, personally liable for loss. P. S. 119, §§ 55, 57.

If a company is under liability for losses equal to its net assets, and the president and directors knowing it make or assent to further insurance, they shall be personally liable for any loss under such insurance.

If the directors allow to be insured on a single risk a larger sum than the law permits they shall be liable for any loss thereon above the amount they might lawfully insure.

Payment and Investment of Capital.

SECTION 34. The capital stock shall be paid in cash within twelve months from date of charter or certificate of organization, and no certificates of full shares and no policies shall be issued until the whole capital is paid in. A majority of the

Capital to be paid in within twelve months and invested; directors to make certificate. P. S. 119, § 54.

Amount of. See § 32. No policies or certificate of shares to issue until whole capital is paid in.

directors shall certify on oath that the money has been paid by the stockholders for their respective shares and the same is held as the capital of the company invested or to be invested as required by this section.

Investments and loans of capital. P. S. 119, § 55. 1885, c. 308. Real estate. See § 25. Different classes of securities in which companies may invest their capital.

Such capital shall be invested only as follows:

First, In first mortgages of real estate in this Commonwealth.

Second, In public funds of the United States or of any of the New England states, New York, Pennsylvania, Ohio, Michigan, Indiana, Illinois, Wisconsin and Iowa, and of the District of Columbia.

Third, In the bonds or notes of any city, county or town, or incorporated district of this Commonwealth; or of any city of any other of the New England states whose net indebtedness does not exceed five per cent. of the last preceding valuation of the property therein for purposes of taxation; or of any county or town of Maine, New Hampshire, Vermont, Rhode Island or Connecticut, whose net indebtedness does not exceed three per cent. of such valuation of its taxable property.

Fourth, In the legally authorized bonds for municipal purposes of any city of more than thirty thousand inhabitants in the states of New York, Pennsylvania, Ohio, Michigan, Indiana, Illinois, Wisconsin and Iowa, whose net indebtedness at the date of such investment does not exceed five per cent. of the valuation of its property for assessment of taxes.

The term "net indebtedness" as used here and in the preceding clause excludes any debt created to provide a supply of water for general domestic use, and allows credit for the sinking-funds of a county, city, town, or district, available for the payment of its indebtedness.

Fifth, In the first mortgage bonds of any railroad company incorporated under the authority of any of the New England states and whose road is located wholly or in part in the same, and which is in possession of and operating its own road and has earned and paid regular dividends for the two years next preceding such investment; or in the first mortgage bonds, guaranteed by any such railroad company, of any railroad so incorporated whose road is thus located; or in the bonds, stocks or notes of any railroad company incorporated under the laws of this Commonwealth and whose road is located wholly or in part therein and is unencumbered by mortgage, and which has paid a dividend of not less than five per cent. per annum for two

years next preceding such investment; or in bonds, stocks and notes issued according to law of either the Old Colony Railroad Company, the Fitchburg Railroad Company, or the Worcester, Nashua and Rochester Railroad Company.

But the term "railroad companies" as here used shall not be construed to include street railway companies.

Sixth, In the stock of any bank incorporated under the authority of this Commonwealth, or of any banking association located in the New England States and incorporated under the authority of the United States.

Seventh, In loans upon the note or notes of any citizen of this Commonwealth secured by pledge as collateral of any of the before-named securities. Where the pledged securities are of those specified in the first, second, third or fourth clauses, as above, the loan thereon may be of an amount not more than their par value. Where the pledged securities are of those specified in the fifth and sixth clauses, the loan thereon shall not exceed their par value nor be more than four-fifths of their market value.

1896, c. 171.

And in addition the capital stock of insurance companies may be invested in any of the securities in which savings banks may invest their deposits.

Limit in amount of particular investments.

But no insurance company shall together own or hold in pledge more than one-fourth of the capital stock of any bank; nor invest in or lend upon the stock and bonds together of any railroad company more than one-tenth of its own capital; nor shall its entire investment in and loans upon all railroad property and securities exceed one-third of its capital; nor shall it loan more than sixty per cent. of its capital on mortgage of real estate, nor more than one-fifth of its capital in one mortgage.

Impairment, Increase and Reduction of Capital.

SECTION 35. When the net assets of a company do not amount to more than three-fourths of its original capital, it may make good its capital to the original amount by assessment of its stock.

Shares forfeited by non-payment of assessment.

Shares on which such an assessment is not paid within sixty days after demand shall be forfeitable, and may be cancelled by a vote of the directors, and new shares issued to make up the deficiency.

If capital not made good or reduced,

If such company shall not within three months after notice from the insurance commissioner to that effect make good its

authority of company to do business to cease.

capital as aforesaid, or reduce the same as allowed by section thirty-seven, its authority to transact new business of insurance shall cease.

May increase capital by issue of new shares to be paid for in full; or by dividends of actual net surplus. P. S. 119, §§ 62, 70, 71.

SECTION 36. Any such company may issue *pro rata* to its stockholders certificates of any portion of its actual net surplus it may deem fit to divide, which shall be deemed to be an increase of its capital to the amount of such certificates. And such company may, at a meeting called for the purpose, vote to increase the amount and number of shares of its capital stock, and to issue certificates thereof when paid for in full.

Certificate of increase to be approved by insurance commissioner and filed with secretary of the Commonwealth.

In whichever mode the increase is made, the company shall, within thirty days after the issue of such certificates, submit to the insurance commissioner a certificate setting forth the amount of the increase and the facts of the transaction, signed and sworn to by its president and secretary and a majority of its directors. If the commissioner finds that the facts conform to the law he shall indorse his approval thereof; and, upon filing such certificate so indorsed with the secretary of the Commonwealth, and the payment of a fee of five dollars for filing the same, the company may transact business upon the capital as increased, and the commissioner shall issue his certificate to that effect.

May reduce capital.

SECTION 37. When the capital stock of a company is impaired, such company may, upon a vote of the majority of the stock represented at a meeting legally called for that purpose, reduce its capital stock and the number of shares thereof to an amount not less than the minimum sum required by law. But no part of its assets and property shall be distributed to its stockholders.

The procedure; effect of. P. S. 119, §§ 65-67.

Within ten days after such meeting the company shall submit to the insurance commissioner a certificate setting forth the proceedings thereof and the amount of such reduction and the assets and liabilities of the company, signed and sworn to by its president, secretary and a majority of its directors. The commissioner shall examine the facts in the case, and if the same conform to law, and, in his judgment, the proposed reduction may be made without prejudice to the public, he shall indorse his approval upon the certificate.

Commissioner to approve the reduction.

Upon filing the certificate, so indorsed, with the secretary of the Commonwealth, and paying a fee of five dollars for the filing thereof, the company may transact business upon the

basis of such reduced capital as though the same were its original capital, and its charter shall be deemed to be amended to conform thereto; and the insurance commissioner shall issue his certificate to that effect.

May call in original stock certificates and issue substitute certificates. P. S. 119, § 69. See § 36.

Such company may, by a majority vote of its directors, after such reduction, require the return of the original certificates of stock held by each stockholder in exchange for new certificates it may issue in lieu thereof for such number of shares as each stockholder is entitled to in the proportion that the reduced capital bears to the original capital.

Dividends to be made only from surplus. P. S. 119, § 70.

Not to divide assets while policies remain in force.

SECTION 38. No stock company shall make a dividend, either in cash or stock certificates, except from its actual net surplus computed as required by law in its annual statement; nor shall any such company which has ceased to do new business of insurance divide any portion of its assets, except surplus to its stockholders, until it shall have performed or cancelled its policy obligations. Any such company may declare and pay, annually or semi-annually, from its surplus, cash dividends to its stockholders of not more than ten per cent. of its capital stock in a year; and if the dividends in any year are less than ten per cent. the difference may be made up in any subsequent year or years from surplus accumulations: *provided*, *however*, that any such company may pay such dividend as the directors may deem prudent out of any surplus that shall remain after charging in addition to all its liabilities, except unearned premiums, a sum equal to the whole amount of premiums on unexpired risks, and deducting from the assets all securities and book accounts on which no part of the principal or interest has been paid within the last year and for which foreclosure or suit has not been commenced for collection, or which after judgment obtained thereon shall have remained more than two years unsatisfied and on which interest shall not have been paid, and also deducting all interest due and unpaid on any property of the company.

Cash dividends limited to ten per cent. annually. P. S. 119, §§ 69, 72. 1891, c. 289.

(MUTUAL FIRE COMPANIES.)

Not to issue policies until $1,000,000 insurance is subscribed for. 1896, c. 126.

SECTION 39. No policy shall be issued by a purely mutual fire insurance company hereafter organized, nor by a mutual fire insurance company with a guaranty capital of less than one hundred thousand dollars, until not less than one million dollars of insurance, in not less than four hundred separate risks upon

Exception. P. S. 119, § 38. 1894, c. 500.

property located in Massachusetts, has been subscribed for and entered on its books; except that in any town of less than four thousand inhabitants a company may be formed to insure only dwelling houses, farm buildings, and their contents within such town, and may issue policies when fifty thousand dollars of insurance has been subscribed for. But no policy shall be issued under this section until the president and secretary of the company shall have certified under oath that each and every subscription for insurance in the list presented to the insurance commissioner for approval is genuine, and made with an agreement with each and every subscriber for insurance that he will take the policies subscribed for by him within thirty days of the granting of a license to the company by the insurance commissioner to issue policies. For taking a false oath in respect to such certificate such officers shall be deemed guilty of the crime of perjury, and be subject to the legal penalties therefor. No officer or other person whose duty it is to determine the character of the risks, and upon whose decision the applications shall be accepted or rejected by a mutual fire insurance company, shall receive as any part of his compensation a commission upon the premiums, but his compensation shall be a fixed salary and such share of the net profits as the directors may determine. Nor shall such officer or person aforesaid be an employee of any officer or agent of the company.

Oath required of president and secretary. 1907, c. 62.

Officers not to be paid commissions on premiums. 1894, c. 500.

Members and Elections.

All insured persons members; entitled to notice of meetings and to vote. P. S. 119, § 78.

SECTION 40. Every person insured by a mutual fire insurance company shall be a member while his policy is in force, entitled to one vote for each policy he holds, and shall be notified of the time and place of holding its meetings by a written notice or by an imprint upon the back of each policy, receipt or certificate of renewal, as follows, to wit: —

The assured is hereby notified that by virtue of this policy he is a member of the Insurance Company, and that the annual meetings of said company are holden at its home office on the day of in each year, at o'clock.

The blanks shall be duly filled in print, and the same shall be deemed a sufficient notice.

A corporation which becomes a member of such company may authorize any person to represent it in such company, and such representative shall have all the rights of an individual member.

Trustee of insured property and representative of insured corporation entitled to rights of a member. P. S. 119, §§ 84, 85.

Any person holding property in trust may insure the same in such company, and as such trustee assume the liabilities and be entitled to the rights of a member, but shall not be personaly liable upon such contract of insurance.

Proxies.

Members may vote by proxies dated and executed within three months and returned and recorded on the books of the company three days or more before the meeting at which they are to be used; but no person shall be allowed as proxy or otherwise to cast more than twenty votes, and no officer or agent shall himself or by another ask for, receive, procure to be obtained or use a proxy vote.

Number of votes a member may cast. Officer cannot hold proxy. P. S. 119, § 80. Penalty. Stat. § 107.

Every such company shall elect by ballot a board of not less than seven directors, who shall manage and conduct its business and who shall hold office for one year or for such term as the by-laws may provide, in accordance with section twenty-five and until their successors are qualified.

Two-thirds at least of the directors shall be citizens of the Commonwealth, and after the first election members only shall be eligible, but no director shall be disqualified from serving the term he was chosen for by reason of the expiration or cancellation of his policy: *provided*, that in companies with a guaranty capital one-half of the directors shall be chosen by and from the stockholders.

Five or more of the directors shall constitute a quorum for the transaction of business by the vote of a majority of those in attendance.

Vacancies in any office may be filled in such manner as the by-laws shall provide.

Powers and Duties of Officers.

Directors to elect president, etc. P. S. 119, §§ 81, 82.

SECTION 41. The directors shall annually choose by ballot a president who shall be a member of the board, a secretary, a treasurer who may also be either the president or secretary, and such other officers as the by-laws provide.

To call special meetings, when.

They may call special meetings of the members of the corporation whenever they see fit, of which each member shall have such notice as the by-laws provide, and shall call such meetings upon the written request of twenty members or of the owners

of one fifth of the guaranty capital, setting forth the purpose thereof.

Officers to be sworn.

The president, the vice-president, if there be one, and the secretary, and treasurer shall be annually sworn, and their oaths be entered of record in the books of the corporation. The president, or in his absence the vice-president, shall preside at all meetings of the directors or members. In the absence of both, a president *pro tempore* may be chosen.

President, etc., to preside at meetings.

The secretary to keep record of transactions

The secretary shall keep a record of the votes, whether cast in person or by proxy, and the other proceedings of all meetings of the directors and of the members; a true list of the holders of the guaranty capital, if any, the number of shares owned by each, and a record of all transfers of such shares; and shall record all policies issued and all authorized assignments, transfers and cancellations thereof; and such other books and records as the president and directors may require.

Record to be evidence. Penalty for false record.

The records so kept shall be evidence of the transactions to which they relate, and for making any wilfully false record the secretary shall be deemed guilty of the crime of perjury. Such records shall be open to the inspection of any person interested therein.

Companies with a Guaranty Capital.

Amount of capital. P. S. 119, §§ 74, 75, 76. 1895, c. 190.

SECTION 42. A mutual fire insurance company may be formed with, or a mutual fire insurance company now existing may establish, a guaranty capital of not less than twenty-five thousand dollars nor more than two hundred thousand dollars, divided into shares of one hundred dollars each, which shall be invested in the same manner as is provided for the investment of the capital stock of certain insurance companies by section thirty-four of this act. The stockholders of the guaranty capital of a company, acquired under the provisions of the Public Statutes of this Commonwealth, or of any acts subsequent thereto, shall be entitled to a semi-annual dividend of not more than three and one-half per cent. on their respective shares if the net profits or unused premiums left after all expenses, losses and liabilities then incurred, together with the reserve for reinsurance, are provided for, shall be sufficient to pay the same. The guaranty capital shall be applied to the payment of losses only when the company has exhausted its cash in hand and the invested assets, exclusive of uncollected premiums, and

What dividends shareholders are entitled to.

When guaranty capital is liable for losses.

when thus impaired, the directors may make good the whole or any part of it by assessments upon the contingent funds of the company at the date of such impairment. Shareholders and members of such companies shall be subject to the same provisions of law in respect to their right to vote as apply respectively to shareholders in stock companies and policy holders in purely mutual companies; and said guaranty capital shall be retired when the permanent fund of the company equals two per cent. of the amount insured upon all policies in force; and said guaranty capital may be reduced or retired by vote of the policy holders of the company and the assent of the insurance commissioner, provided the net assets of the company above its reinsurance reserve and all other claims and obligations, exclusive of guaranty capital, for two years immediately preceding and including the date of its last annual statement, shall be not less than twenty-five per cent. of the guaranty capital. Due notice of such proposed action on the part of the company shall be mailed to each policy holder of the company not less than thirty days before the meeting when such action may be taken, and shall also be advertised in two papers of general circulation approved by the insurance commissioner, not less than three times a week for a period of not less than four weeks before said meeting. No insurance company with a guaranty capital, which has ceased to do new business, shall divide to its stockholders any part of its assets or guaranty capital except income from investments until it shall have performed or cancelled its policy obligations.

Impairment of capital, how made good.

Right to vote of shareholders and members.

Permanent Fund.

SECTION 43. The net profits, by which term is meant all of the funds remaining after deducting all liabilities (including unearned premiums) of the mutual fire insurance companies and the special reserve of companies having a guaranty capital as existing on the thirty-first day of December in the year eighteen hundred and eighty-nine, are hereby set apart as and declared to be the permanent fund of such companies; the directors shall cause the same to be invested in the securities described in section thirty-four, and the same shall be held as a reserve for the security of the insured. When the amount of this permanent fund is less than two per cent. of the sum

Mutual companies may accumulate a permanent fund. P. S. 119, § 96. 1890, c. 26.

Limit of accumulation.

insured upon all policies in force, the director may annually, if they so determine, set apart not exceeding twenty per cent. of the net profits of the preceding year, and add the same to the permanent fund, until said limitations of two per cent. has been reached, after which there shall be no further addition to said fund except as hereinafter provided. The permanent fund so accumulated shall be used for the payment of losses and expenses whenever the cash funds of the company in excess of an amount equal to its liabilities, including guaranty capital, are exhausted; and whenever the said fund is drawn upon, the reservation of profits as aforesaid may be renewed or continued until the limit of accumulation as herein provided is reached. The income of the permanent fund shall be included annually in the cash receipts of the company: *provided*, that nothing herein contained shall affect the rights, at the date of the passage of this act, of holders of policies in companies having a guaranty capital.

Dividends and Assessments.

Members entitled to profits and liable for losses. P. S. 110, §§ 67, 107.

SECTION 44. The directors of any mutual fire insurance company may, from time to time, by vote, fix and determine the amount to be paid as a dividend upon policies expiring during each year. In the year eighteen hundred and ninety-five, and at the expiration of each term of five years thereafter, the directors shall, subject to the provisions of section forty-three, apportion as an extra dividend, according to their best judgment, proportionately to the holders of policies which have expired during the preceding five-year period the entire remaining net profits. Any such dividends remaining uncalled for on the thirty-first day of December in the year eighteen hundred and ninety-nine, and at the end of each five-year period thereafter, shall be forfeited to the company. Each policy holder shall be liable to pay his proportional part of any assessments which may be laid by the company in accordance with law and his contract on account of losses and expenses incurred while he was a member, provided he is notified of such assessment within one year after the expiration of his policy. Mutual companies which make not less frequently than annually an entire apportionment and division of earnings or profits shall not be subject to the provisions of sections forty-three and forty-four.

1897, c. 197.

Companies shall collect full mutual premiums.

SECTION 45. Mutual fire insurance companies, except as provided in the next section, shall charge and collect upon their policies a full mutual premium in cash, or notes absolutely payable. Any such company may in its by-laws and policies fix the contingent mutual liability of its members for the payment of losses and expenses not provided for by its cash funds: *provided*, that such contingent liability of a member shall not be less than a sum equal to and in addition to the cash premium written in his policy. The total amount of the liability of the policy holder shall be plainly and legibly stated upon the back of each policy. Whenever any reduction is made in the contingent liability of members such reduction shall apply proportionally to all policies in force.

May fix the contingent liability of members not less than.

Liability to be stated on policy.

Certain companies may do business with deposit notes. P. S. 119, § 115.

SECTION 46. Mutual fire insurance companies now organized and lawfully doing business upon the plan of taking deposit notes for a percentage of the amount insured by its policies, and making a call or assessment thereon for the payment of losses and expenses as the same are incurred, may continue such system of business, and such deposit notes shall constitute the entire liability of their members.

Assessments.

Assessments, when to be made; record of the order for the assessment and a statement to be made. P. S. 119, §§ 98, 99.

SECTION 47. Whenever a mutual fire insurance company is not possessed of cash funds above its reinsurance reserve, sufficient for the payment of incurred losses and expenses, it shall make an assessment for the amount needed to pay such losses and expenses upon its members liable to assessment therefor, in proportion to their several liability.

The company shall cause to be recorded in a book kept for that purpose the order for such assessment, together with a statement which shall set forth the condition of the company at the date of the order, the amount of its cash assets and of its deposit notes or other contingent funds liable to the assessment, the amount the assessment calls for and the particular losses or other liabilities it is made to provide for. Such record shall be made and signed by the directors who voted for the order, before any part of the assessment is collected, and any person liable to the assessment may inspect and take a copy of the same.

Alternative assessments, compulsory and

SECTION 48. When by reason of depreciation or loss of its funds or otherwise the cash assets of such a company, after

optional, may be made. P. S. 119, § 100.

providing for its other debts, are less than the required premium reserve upon its policies, it shall make good the deficiency by assessment in the mode provided in the preceding section; or if the directors are of the opinion that the company is liable to become insolvent they may, instead of such assessment, make two assessments, the first determining what each policy-holder must equitably pay or receive in case of withdrawal from the company and having his policy cancelled, the second what further sum each must pay in order to reinsure the unexpired term of his policy at the same rate as the whole was insured at first. Each policy-holder shall pay or receive according to the first assessment, and his policy shall then be cancelled, unless he pays the sum further determined by the second assessment, in which case his policy shall continue in force; but in neither case shall a policy-holder receive or have credited to him more than he would have received on having his policy cancelled by vote of the directors, under the by-laws.

Unless both assessments are paid on policies of the amount of $500,000 the company to cease business. P. S. 119, § 106.

If within two months after such alternative assessments have become collectible the amount of the policies whose holders have settled for both assessments is less than five hundred thousand dollars, the company shall cease to issue policies; and all policies whose holders have not settled for both assessments shall be void, and the company shall continue only for the purpose of adjusting the deficiency or excess of premiums among the members, and settling outstanding claims.

Members to be notified of assessment. P. S. 119, § 107. 1897, c. 197.

No assessment shall be valid against a person who has not been duly notified thereof within one year after the expiration or cancellation of his policy. And when an assessment is ordered the directors shall forthwith cause written notice and demand for payment to be made upon each person subject thereto, by mail or personal service.

Supreme judicial court may order assessment or adjudge the necessity of one called by directors; procedure; decree of the court P. S. 119, §§ 101, 105.

SECTION 49. When the directors make an assessment or call on the members for money, or vote that there exists a necessity for such assessment or call, they or any person interested in the company as an officer, policy-holder or creditor, may apply to the supreme judicial court for any county, by a petition in the nature of a bill in equity, praying the court to examine said assessment or call, the necessity therefor, and all matters connected therewith, and to ratify, amend or annul the assessment or call, or to order that the same be made as law and justice may require; but application when made by

any party except the corporation, or a receiver, or the insurance commissioner, shall rest in the discretion of the court. When the directors unreasonably neglect to make an assessment or call to satisfy an admitted or ascertained claim upon the company, any judgment creditor, or any person holding such claim, or the insurance commissioner, may make the application to the court. Upon such application, if made by the directors, or upon an order of the court, if made by any other party, the directors shall set forth the claims against the company, its assets, and all other facts and particulars appertaining to the matter.

The court before which such petition is filed shall order notice to be given by publication or otherwise to all parties interested, and upon the return thereof shall proceed to examine the assessment or call, or the necessity therefor, and all matters connected therewith. Any parties interested may appear and be heard thereon. All questions that arise shall be heard and determined as in other equity cases.

The application shall be referred to an auditor, who shall appoint a time and place to hear all parties interested, and shall give personal notice thereof in writing to the insurance commissioner, and through the post-office, so far as he is able, to all persons liable upon said assessment or call. The auditor shall hear the parties, and report upon the correctness of the assessment or call, and all matters connected therewith. The court may ratify, amend or annul the assessment or call, or order one to be made; and may make such orders and decrees in the premises as under all the circumstances justice and equity require. If the assessment or call is altered or amended, or one is ordered to be made, the directors shall forthwith proceed to vote the same in legal form, and the record of such vote shall be set forth in a supplemental bill or answer.

When an assessment or call has been so ratified, ascertained or established, a decree shall be entered which shall be final and conclusive upon the company and all parties liable to the assessment or call, as to the necessity of the same, the authority of the company to make or collect the same, the amount thereof, and all formalities connected therewith. An assessment or call altered or amended by vote of directors and decree of the court thereon shall be binding upon all parties who would have

been liable under it as originally made, and in all legal proceedings shall be held to be such original assessment or call. All such proceedings shall be at the cost of the company, unless the court for cause otherwise orders; and in all cases the court may control the disposition of the funds collected under such proceedings.

If it appears to the court before which such application is pending that the net proceeds of any assessment or call will not be sufficient to furnish substantial relief to those having claims against the company, the judge may decree that no assessment shall be collected; and when, upon the application of the insurance commissioner or a member of the company, or of any person interested, the judge is of opinion that further attempts to collect an assessment then partially collected will not benefit those having claims against the company, he may stay the further collection of said assessment.

Personal Liability of Officers.

Officer shall give no guaranty against assessment. P. S. 119, § 108. Penalty. See § 106.

SECTION 50. No director or other officer of a mutual fire insurance company shall either officially or privately give a guaranty to a policy-holder thereof against an assessment to which he would otherwise be liable.

Directors liable if they neglect to make assessment. P. S. 119, §§ 109, 110.

If the directors of any such company shall neglect or omit for the space of six months to lay and collect with all practicable diligence any assessment they are required to make by sections forty-eight and forty-nine, they shall be personally liable for all debts and claims then outstanding against the company, or that may accrue until such assessment is laid and put in process of collection.

Treasurer liable for neglect to collect assessment. P. S. 119, § 112.

If the treasurer of such company unreasonably neglects to collect an assessment made by order of the directors, and to apply the same to the payment of the claims for which it was made, he shall be liable in his private capacity to the party having such claims, for the amount of the assessment; and he may repay himself out of any money afterwards received for the company on account of said assessment.

Directors liable for neglect to satisfy judgment or assess therefor.

When sufficient property of any such company cannot be found to satisfy an execution issued against it, and it has property belonging to the period assessed, the proceeds of which can be applied to satisfy such execution, if the directors neglect to pay the same, or neglect for thirty days after the

rendition of judgment to make an assessment and deliver the same to the treasurer for collection, or to apply such assessment when collected to the payment of the execution, they shall be personally liable for the amount of the execution.

When the directors of any such company are liable to pay an execution against it the creditor may recover the same by a suit in equity or by an action at law against the directors. The director who pays an execution against the company for which he is personally liable may have a suit at law with equitable remedies for contribution against any of the directors for their proportion, and also a suit at law with equitable remedies against the company or the individual members thereof to the extent of their several liability to assessment therefor.

Remedy of judgment creditor, and of director who pays an execution. P. S. 119, §§ 110, 111.

Limit of Risks.

SECTION 51. Mutual fire insurance companies may insure property in any of the New England states, New York, New Jersey and Pennsylvania. Such companies which have a guaranty capital or which insure manufacturing as well as other property may make insurances upon property located in any part of the United States or in Canada.

Location of property companies may insure. P. S. 119, § 83. 1886, c. 222. See §§ 20, 56, 57. 1893, c. 54.

MUTUAL MARINE AND MUTUAL FIRE AND MARINE COMPANIES.

SECTION 52. A mutual marine insurance company organized under this act shall have an agreement under the seal of each subscriber thereto, substantially as follows, namely:

Mutual marine company to have a subscription liability fund.

The subscribers severally agree to pay to the Insurance Company on demand the whole or such part of the sums set against our names as may be called from time to time for the use of said company in the payment of its losses and expenses not otherwise provided for.

Form of subscription. P. S. 119, § 116.

Such companies shall not issue policies until the amount of three hundred thousand dollars, which shall be the total of such subscriptions, shall have been so subscribed, and a certificate signed by the president and a majority of the directors, certifying that the subscribers are known to them and that they believe them to be solvent and able to pay their subscriptions, has been deposited with and approved by the insurance commissioner. Whenever a subscriber dies or becomes insolvent his subscription shall be cancelled, and whenever the amount of

Not to issue policies until $300,000 is subscribed and certified.

Amount of subscriptions to be kept good.

the subscription fund is thereby or otherwise reduced, the deficiency shall be made good by new subscriptions certified in the same manner as the original. Subscribers shall be entitled to annual dividends of two per cent. upon the amount of their subscriptions from the profits of the company, and shall also be reimbursed from future profits for all sums of money they may pay the company for its uses under their agreement, with lawful interest thereon.

Subscribers entitled to dividends and reimbursement of payments upon subscriptions.

Company shall accumulate profits and issue scrip therefor.

The net profits or divisible surplus of such companies shall be annually divided among the insured whose policies terminated within the year, in proportion to the contribution of each to such profits or surplus, and such dividends shall be made only in scrip certificates payable only out of the accumulation of net profits or surplus, which accumulation shall constitute and be kept and invested by the company as a separate fund in trust for the redemption of such scrip certificates and the contingent payment of losses and expenses as herein provided. Such certificates until redeemed shall be subject to future losses and expenses of the company and to be reduced in case the redemption fund is drawn upon for the payment of such loss and expenses. But no part of the redemption fund shall be used for the payment of losses or expenses unless and only to the extent that the cash assets of the company are insufficient therefor; and whenever any portion thereof shall be used for such payment the outstanding certificates shall be reduced in proportion, so that the redemption fund shall at all times equal the amount of the unredeemed certificates. The net income of the redemption fund shall be divided annually among the holders of its certificates; or the company may make such certificates with a specific rate of interest payable from the income of its invested funds. As such profits accumulate and are invested, subscriptions of an equal amount shall be cancelled.

Limit of accumulation of profits.

The maximum of such accumulation of profits shall be three hundred thousand dollars, and all excess of profits above said amount shall be applied annually to the payment of the certificates in the order of their issue. The certificates shall be forthwith payable when the company shall cease to issue policies and the fund is no longer liable to be drawn upon for the payment of losses.

Companies heretofore organized. P. S. 119, §§ 117, 150.

SECTION 53. Every mutual marine and mutual fire and marine insurance company heretofore organized under any law of the Commonwealth shall remain subject to the provisions

applicable to each contained in sections one hundred and seventeen to one hundred and thirty inclusive, of chapter one hundred and nineteen of the Public Statutes, notwithstanding the repeal of said chapter. Any such company may redeem its certificates of dividends of profits when its permanent fund has been paid in cash and invested and its surplus is sufficient for the purpose. The shareholders of the permanent fund of any such company shall hereafter be entitled to not exceeding five per cent. semi-annual dividends thereon.

May redeem certificates of profits.

Dividends to shareholders reduced.

Section 54. All domestic mutual marine insurance companies shall be subject to the provisions of sections forty and forty-one, and each subscriber to the permanent fund, or agreement specified in section fifty-two, of any such company shall be a member thereof during the term of his subscription and entitled to one vote.

Rights of members; election, powers and duties of officers.

Personal Liability of Officers.

Section 55. If a subscriber to the permanent fund or agreement of a mutual marine or mutual fire and marine insurance company fails to pay his subscription or any assessment thereon, and it is proven that the president or a director certified falsely in regard to such subscriber, the person certifying shall be liable to the company for such sum as the subscriber fails to pay.

For certifying falsely. P. S. 119, § 119.

If any such company is at any time liable for losses beyond the amount of its net assets the president and directors shall be personally liable for all losses on insurance effected while the company was in such condition.

For over-insurance. P. S. 119, § 123. 10 Gray, 325. 12 Gray, 355.

FIRE INSURANCE.

[Section 56 was repealed by chap. 178, Acts of 1898.]

Section 57. No insurance company shall knowingly issue any fire insurance policy upon property within this Commonwealth for an amount which together with any existing insurance thereon exceeds the fair value of the property, nor for a longer term than seven years.

Over-insurance forbidden. P. S. 119, § 136.

[When buildings insured against loss by fire, and situated within this Commonwealth, are totally destroyed by fire, the company shall not be liable beyond the actual value of the insured property at the time of the loss or damage; and if it shall appear that the insured has paid premiums on a sum in excess of said actual value the assured shall be reimbursed the proportionate excess of premiums paid on the difference between the

amount named in the policy and the ascertained value, with interest at six per cent. per annum from the date of issue; and said excess of premiums and interest thereon shall be allowed the insured from the time any company or companies carrying said insurance at the time of the loss have continuously carried the insurance on the destroyed building or buildings, whether under policies existing at the time of the loss or under previous policies in the same company or companies.

This act shall take effect on the first day of October in the year eighteen hundred and ninety-eight.] Chap. 571, Acts of 1898.

[Every insurance company transacting business in this Commonwealth shall, upon receiving notice of loss by fire upon property in Massachusetts on which it is liable under a policy of insurance, forthwith notify the state fire marshal thereof, and no insurance upon any such property shall be paid by any company until one week after such notification.] Chap. 118, Acts of 1897.

Payment to mortgagees protected by policies. P. S. 119, § 137.

SECTION 58. Where by an agreement with the insured or by the terms of a fire insurance policy taken out by a mortgagor the whole or any part of the loss thereon is payable to a mortgagee or mortgagees of the property or for their benefit the company shall, upon satisfactory proof of the rights and title of the parties, in accordance with such terms or agreement, pay all mortgagees protected by such policy in the order of their priority of claim, as their claim shall appear, not beyond the amount for which the company is liable, and such payment shall be, to the extent thereof, payment and satisfaction of the liability of the company under such policy.

Applications and by-laws no warranties unless incorporated in the policy. P. S. 119, § 138.

SECTION 59. In all insurance against loss by fire the conditions of insurance shall be stated in full, and neither the application of the insured nor the by-laws of the company shall be considered as a warranty or a part of the contract, except so far as they are incorporated in full into the policy.

Standard form of fire policy. Penalty. See § 105.

SECTION 60. No fire insurance company shall issue fire insurance policies on property in this Commonwealth, other than those of the standard form herein set forth, except as follows, to wit:

First, A company may print on or in its policies its name, location, and date of incorporation, the amount of its paid-up capital stock, the name of its officers and agents, the number and date of the policy, and, if it is issued through an agent, the words "This policy shall not be valid until countersigned by the duly authorized agent of the company at ."

Second, A company may print or use in its policies printed forms of description and specification of the property insured.

Third, A company insuring against damage by lightning may print, in the clause enumerating the perils insured against, the additional words "Also any damage by lightning, whether fire ensues or not," and, in the clause providing for an apportionment of loss in case of other insurance, the words "whether by fire, lightning or both."

Fourth, A company incorporated or formed in this Commonwealth may print in its policies any provisions which it is authorized or required by law to insert therein; and any company not incorporated or formed in this Commonwealth may, with the approval of the insurance commissioner, so print any provision required by its charter or deed of settlement, or by the laws of its own state or country, not contrary to the laws of this Commonwealth: *provided*, that the insurance commissioner shall require any provision which, in his opinion, modifies the contract of insurance in such way as to affect the question of loss, to be appended to the policy by a slip or rider as hereinafter provided.

Fifth, The blanks in said standard form may be filled in print or writing.

Sixth, A company may print upon policies issued in compliance with the preceding provisions of this section the words "Massachusetts Standard Policy."

Seventh, A company may write upon the margin or across the face of a policy, or write, or print in type not smaller than long primer, upon separate slips or riders to be attached thereto, provisions adding to or modifying those contained in the standard form; and all such slips, riders and provisions must be signed by the officers or agent of the company so using them.

The said standard form of policy shall be plainly printed, and no portion thereof shall be in type smaller than long primer, and shall be as follows, to wit:

No. $———

[Corporate name of the company or association; its principal place or places of business.]

This company shall not be liable beyond the actual value of the insured property at the time any loss or damage happens.

In consideration of dollars to it paid by the insured, hereinafter named, the receipt whereof is hereby acknowledged, does insure and legal representatives against loss or damage by fire, to the amount of dollars.

(Description of property insured.)

Property not covered by policy.

Bills of exchange, notes, accounts, evidences and securities of property of every kind, books, wearing apparel, plate, money, jewels, medals, patterns, models, scientific cabinets and collections, paintings, sculpture, and curiosities are not included in said insured property, unless specially mentioned.

Term. 1895, c. 50.

Said property is insured for the term of , beginning on the day of , in the year hundred and , at noon, and continuing until the day of , in the year hundred and , at noon, against all loss or damage by FIRE originating from any cause except invasion, foreign enemies, civil commotions, riots, or any military or usurped power whatever; the amount of said loss or damage to be estimated according to the actual value of the insured property at the time when such loss or damage happens, but not to include loss or damage caused by explosions of any kind unless fire ensues, and then to include that caused by fire only.

Perils insured against.

Matters voiding policy.

This policy shall be VOID if any material fact or circumstance stated in writing has not been fairly represented by the insured, — or if the insured now has or shall hereafter make any other insurance on the said property without the assent in writing or in print of the company, — or if, without such assent, the said property shall be removed, except that, if such removal shall be necessary for the preservation of the property from fire, this policy shall be valid without such assent for five days thereafter, — or if, without such assent, the situation or circumstances affecting the risk shall, by or with the knowledge, advice, agency or consent of the insured, be so altered as to cause an increase of such risks, or if, without such assent, the said property shall be sold, or this policy assigned, or if the premises hereby insured shall become vacant by the removal of the owner or occupant, and so remain vacant for more than thirty days without such assent, or if it be a manufacturing establishment, running, in whole or in part, extra time, except that such establishments may run, in whole or in part, extra hours not later than nine o'clock P.M., or if such establishments shall cease operation for more than thirty days without permission in writing indorsed hereon, or if the insured shall make any attempt to defraud the company either before or after the loss, — or if gunpowder or other articles subject to legal restriction shall be kept in quantities or manner different from those allowed or prescribed by law, — or if camphene, benzine, naphtha, or other chemical oils or burning fluids shall be kept or

used by the insured on the premises insured, except that what is known as refined petroleum, kerosene, or coal oil, may be used for lighting, and in dwelling-houses kerosene-oil stoves may be used for domestic purposes, — to be filled when cold, by daylight, and with oil of lawful fire test only. 1895, c. 59.

If the insured property shall be exposed to loss or damage by fire, the insured shall make all reasonable exertions to save and protect the same. Assured to protect property in case of exposure to fire.

In case of any loss or damage under this policy, a STATEMENT in writing, signed and sworn to by the insured, shall be forthwith rendered to the company, setting forth the value of the property insured, the interest of the insured therein, all other insurance thereon, in detail, the purposes for which and the persons by whom the building insured, or containing the property insured, was used, and the time at which and manner in which the fire originated, so far as known to the insured. The company may also examine the books of account and vouchers of the insured, and make extracts from the same. Statement by insured in case of loss.

In case of any loss or damage, the company, within sixty days after the insured shall have submitted a statement, as provided in the preceding clause, shall either pay the amount for which it shall be liable, *which amount if not agreed upon shall be ascertained by award of referees as hereinafter provided*, or replace the property with other of the same kind and goodness, — or it may, within fifteen days after such statement is submitted, notify the insured of its intention to rebuild or repair the premises, or any portion thereof separately insured by this policy, and shall thereupon enter upon said premises and proceed to rebuild or repair the same with reasonable expedition. It is moreover understood that there can be no abandonment of the property insured to the company, and that the company shall not in any case be liable for more than the sum insured, with interest thereon from the time when the loss shall become payable, as above provided. Payment of loss to be made within sixty days after proof, unless company elects to replace or repair.

If there shall be any OTHER INSURANCE on the property insured, whether prior or subsequent, the insured shall recover on this policy no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon. And whenever the company shall pay any loss, the insured shall assign to it, to the extent of the amount so paid, all rights to recover satisfaction for the loss or damage from any person, town or other corporation, excepting other insurers; or the insured, if requested, shall prosecute therefor at the charge and for the account of the company. Apportionment of loss in case of other insurance. Insured to assign to company claims against third parties.

If this policy shall be made payable to a mortgagee of the insured real estate, no act or default of any person other than such mortgagee or his agents, or those claiming under him, shall affect such mortgagee's right to recover in case of loss on such real estate: *provided*, Rights of parties in case the policy is made payable to a mortgagee.

that the mortgagee shall, on demand, pay according to the established scale of rates for any increase of risks not paid for by the insured; and whenever this company shall be liable to a mortgagee for any sum for loss under this policy, for which no liability exists as to the mortgagor, or owner, and this company shall elect by itself, or with others, to pay the mortgagee the full amount secured by such mortgage, then the mortgagee shall assign and transfer to the companies interested, upon such payment, the said mortgage, together with the note and debt thereby secured.

Cancellation of policy.

This policy may be CANCELLED at any time at the request of the insured, who shall thereupon be entitled to a return of the portion of the above premium remaining, after deducting the customary monthly short rates for the time this policy shall have been in force. The company also reserves the right, after giving written notice to the insured, and to any mortgagee to whom this policy is made payable, and tendering to the insured a ratable proportion of the premium, to cancel this policy as to all risks subsequent to the expiration of ten days from such notice, and no mortgagee shall then have the right to recover as to such risks.

Differences to be submitted to referees.

In case of loss under this policy and a failure of the parties to agree as to the amount of loss, it is mutually agreed that the amount of such loss shall be referred to three disinterested men, the company and the insured each choosing one out of three persons to be named by the other, and the third being selected by the two so chosen; the award in writing by a majority of the referees shall be conclusive and final upon the parties as to the amount of loss or damage, and such reference unless waived by the parties *shall be a condition precedent to any right of action in law or equity to recover for such loss*; but no person shall be chosen or act as a referee against the objection of either party, who has acted in a like capacity within four months.

No suit or action against this company for the recovery of any claim by virtue of this policy shall be sustained in any court of law or equity in this Commonwealth unless commenced within two years from the time the loss occurred.

In witness whereof the said company has caused this policy to be signed by its president and attested by its secretary [or by such proper officers as may be designated], at their office in [date].

1897, c. 357.

In case of loss under any fire insurance policy, issued on property in this Commonwealth, in the standard form above set forth, and the failure of the parties to agree as to the amount of loss, the insurance company shall, within ten days after a written request to appoint referees under the provision for

arbitration in such policy, name three men under such provision, each of whom shall be a resident of this Commonwealth and willing to act as one of such referees; and such insurance company shall, within ten days after receiving the names of three men named by the insured under such provision, make known to the insured its choice of one of them to act as one of such referees. And in case of the failure of two referees, chosen, respectively, by the insurance company and the insured, to agree upon and select within ten days from their appointment a third referee willing to act in said capacity, either of the parties may within twenty days from the expiration of said ten days make written application, setting forth the facts, to the insurance commissioner to appoint such third referee; and said commissioner shall thereupon make such appointment and shall send written notification thereof to the parties. In every case of the appointment by the insurance commissioner of said third referee the insuring company or companies shall withhold from the amount of the award rendered one half of the compensation and expenses of said referee, and the said company or companies shall thereupon be obligated to pay to the said referee the full amount of the expenses for such reference. 1896, c. 137.

FIDELITY INSURANCE AND CORPORATE SURETY.

Fidelity insurance companies may insure the fidelity of persons and act as surety on bonds, etc. 1884, c. 296. 1885, c. 241.

SECTION 61. Any company organized under this act or chartered by any other state or government to transact fidelity insurance and corporate suretyship, and qualified to do business in this Commonwealth, may make contracts of insurance to guarantee the fidelity of persons holding positions of trust in private or public employment or responsibility, and may, if accepted and approved by the court, magistrate, obligee, or person competent to approve such bond, act as surety upon the official bond or undertaking in civil procedure of any person or corporation to the United States, to the Commonwealth of Massachusetts, or to any county, city, town, judge of probate and insolvency, sheriff or other court, magistrate or public officer, or to any corporation or association public or private; and also may act as surety upon any bond or undertaking to any person or corporation or to the Commonwealth of Massachusetts conditioned upon the performance of any duty or trust or for the doing or not doing of anything in said bond specified, and upon bonds to indemnify against loss any person 1899, c. 364.

or persons who are responsible as surety or sureties upon a written instrument or otherwise for the performance by others of any office, employment, contract or trust. Where by law two or more sureties are required upon any obligation such company is authorized to insure, it may act as sole surety thereon, and may be accepted as such by the court, magistrate or other officer or person authorized to approve the sufficiency of such bond or undertaking; and so much of section one of chapter one hundred and forty-three of the Public Statutes as requires that sureties on bonds to a judge of probate shall be residents of the Commonwealth shall not be construed to forbid the acceptance of a qualified foreign corporation as joint or sole surety on any such bond. No such company shall incur in behalf or on account of any one person, partnership, association or corporation a liability for an amount larger than one-tenth of its paid-up capital, unless it shall be secured from loss thereon beyond that amount by suitable and sufficient collateral agreements of indemnity, by deposit with it in pledge or conveyance to it in trust for its protection, of property equal in value to the excess of its liability over such limit, or, in case such liability is incurred in behalf or on account of a fiduciary holding property in a trust capacity, by such deposit or other disposition of a suitable and sufficient portion of the estate so held, that no further sale, mortgage, pledge or other disposition can be made thereof without such company's approval, except by the decree of a court having proper jurisdiction.

May be sole surety in certain cases, and upon probate bonds, though non-resident.

Limit of liability a company may incur.

Any person, partnership, association or corporation holding property for the benefit of another, except when acting under wills allowed or trusts created before the passage of this act, may make such covenants with the surety or sureties upon his official bond as shall enable such fiduciary to secure said surety or sureties from loss in any manner provided by this section: *provided, however*, that if such fiduciary was appointed by the decree of any court within this Commonwealth, the approval of such court shall first be obtained to such covenant. A copy of such covenant, duly acknowledged in the manner required for the acknowledgment of deeds of real estate, may be filed and recorded as follows: in the office of the clerk or register of the court in which such fiduciary obtained his appointment; if not appointed by the decree of court, in the manner provided by law for the record of deeds of real estate,

if said covenant concerns real estate, or mortgages of personal property, if said covenant concerns personal property. Such record shall be notice to and binding on all persons.

[Any city may by vote of the city council and any town may at a legal town meeting, vote to raise and appropriate money to pay a proper charge of an insurance company for acting as surety on the official bond given to such city or town by any of its officers for the faithful discharge of their duties. The city authority authorized to approve the bond of a city officer, or the selectmen of a town, may accept an insurance company as sufficient surety upon such bond; but no insurance company shall be so accepted unless it is qualified to do business in this Commonwealth.] Compilation of chap. 132, Acts of 1897, and chap. 45, Acts of 1898.

[See provision relative to surety companies, page 11.]

REAL ESTATE TITLE INSURANCE.

Organization of companies to insure against real estate incumbrances and defects of title, etc. 1884, c. 180.

SECTION 62. Companies may be formed in the manner provided in this chapter, with a capital of not less than two hundred thousand dollars nor more than one million dollars, for the purpose of examining titles to real estate, of furnishing information in relation thereto, and of insuring owners and others interested therein against loss by reason of incumbrances and defective title.

Subject to P. S. 106. Not subject to this act except.

Such companies shall not be subject to the provisions of this chapter except as regards the manner of their formation and as follows, to wit:

Shall file evidence of organization with commissioner and obtain certificate of authority to do business.

Any such corporation, before it shall issue any policy or make any contract of guarantee or insurance, shall file with the insurance commissioner a certified copy of the record of its certificate of its organization in the office of the secretary of the Commonwealth, and shall obtain from the insurance commissioner his certificate that it has complied with the laws applicable to it and is authorized to do business.

To make annual statements of condition.

Every such corporation shall, on or before the fifteenth day of January of each year, file in the office of the insurance commissioner a statement such as he may require of its condition and of its affairs for the year ending on the preceding thirty-first day of December, signed and sworn to by its president or secretary or treasurer and one of its directors, and for neglect to file such annual statements or for making a wilfully false statement shall be liable to the same penalties as

Penalty for neglect or false statement.

Commissioner may visit and examine companies.

are imposed upon insurance companies. The insurance commissioner shall have the same power and authority to visit and examine such corporations as he has in the case of domestic insurance companies, and the duties and liabilities of such corporations and their agents in reference to such examination shall be the same as those of domestic insurance companies.

Not less than two fifths of capital to be set apart and invested in trust for protection of policy-holders.

SECTION 63. Every such corporation shall set apart a sum not less than two fifths of its capital, and not less than one hundred thousand dollars in any case, as a guaranty fund, and shall invest the same in the securities in which domestic insurance companies may invest their capital, and shall issue no policy and make no contract of guaranty or insurance until such sum is so set apart and invested.

The principal of such guaranty fund shall be a trust for the protection of policy-holders and shall be applied only to the payment of losses and expenses incurred by reason of the guaranty or insurance contracts of the corporation. Whenever the corporation shall increase its capital, two fifths or a sufficient part of the increase shall be set apart and duly invested and added to the guaranty fund so that such fund shall always be not less in amount than two fifths of the entire capital.

Guaranty fund when impaired to be made good.

Whenever, by reason of losses or other cause, the guaranty fund is less than two fifths of the capital, the company shall make no further contract of guaranty or insurance until the fund is made good.

Liable to taxation as insurance companies.

SECTION 64. Any company organized under the authority of chapter one hundred and eighty of the acts of the year eighteen hundred and eighty-four shall be subject to the provisions of the two preceding sections, and such company and all corporations established as herein authorized shall be taxable like domestic insurance companies.

Corporations which have been formed under the provisions of chapter one hundred and eighty of the acts of the year eighteen hundred and eighty-four, or of section sixty-two of chapter two hundred and fourteen of the acts of the year eighteen hundred and eighty-seven, and corporations which may hereafter be formed under the provisions of this chapter, may examine titles and furnish information in relation to both personal property and real estate, and may insure owners of both personal property and real estate, and others interested therein, against loss by reason of incumbrances and defective titles.

LIFE INSURANCE AND LIFE INSURANCE COMPANIES.

[See chap. 229, Acts of 1899, page 71.]

What to be deemed life insurance companies. Prohibitions. P. S. 119, § 154.

SECTION 65. All corporations, associations, partnerships or individuals doing business in this Commonwealth under any charter, compact, agreement, or statute of this or any other state, except as provided in section three, involving the payment of money or other thing of value to families or representatives of policy and certificate holders or members, conditioned upon the continuance or cessation of human life, or involving an insurance, guaranty, contract or pledge for the payment of endowments or annuities, shall be deemed to be life insurance companies, and shall not make any such insurance, guaranty, contract or pledge in this Commonwealth, or to or with any citizen or resident thereof, which does not distinctly state the amount of benefits payable, the manner of payment and the consideration therefor, nor the performance of which is contingent upon the payment of assessments made upon survivors.

Companies to cease business after notice. P. S. 119, § 155. Penalty. See § 104.

SECTION 66. No life insurance company, after notice as provided in sections seven and nine, shall issue new policies under its authority to do business in the Commonwealth until its funds have become equal to its liabilities and it has complied with the laws as provided in said sections, and has obtained a certificate to that effect, with license to resume business, from the insurance commissioner.

Admission of foreign life companies.

SECTION 67. A company organized under the laws of any other of the United States for the transaction of life insurance may be admitted to do business in this Commonwealth, provided it has the requisite funds of a life insurance company and in the opinion of the commissioner is in sound financial condition and has policies in force upon not less than one thousand lives for an aggregate amount of not less than one million dollars. Any such company organized under the laws of a state or government other than one of the United States, in addition to the above requirements, must have and keep on deposit or in the hands of trustees, as provided in sections seventy-nine and eighty-one, in exclusive trust for the security of its contracts with policy-holders in the United States, funds of an amount equal to the net value of all its policies in the United States and not less than two hundred thousand dollars.

Favoritism in insurance contracts prohibited.

SECTION 68. No life insurance company doing business in Massachusetts shall make or permit any distinction or discrimination in favor of individuals between insurants of the same class and equal expectation of life in the amount or payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contracts it makes; nor shall any such company or any agent thereof make any contract of insurance, or agreement as to such contract, other than as plainly expressed in the policy issued thereon; nor shall any such company or agent pay or allow, or offer to pay or allow as inducement to insurance, any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefit to accrue thereon, or any valuable consideration or inducement whatever not specified in the policy contract of insurance.

Colored discrimination forbidden. 1884, c. 235. Penalty. See § 109.

SECTION 69. No life insurance company shall make any distinction or discrimination between white persons and colored persons wholly or partially of African descent, as to the premiums or rates charged for policies upon the lives of such persons; nor shall any such company demand or require greater premiums from such colored persons than are at that time required by such company from white persons of the same age, sex, general condition of health, and prospect of longevity, nor shall any such company make or require any rebate, diminution, or discount upon the amount to be paid on such policy in case of the death of such colored person insured, nor insert in the policy any condition, nor make any stipulation whereby such person insured shall bind himself or his heirs, executors, administrators and assigns to accept any sum less than the full value or amount of such policy in case of a claim accruing thereon by reason of the death of such person insured, other than such as are imposed upon white persons in similar cases; and any such stipulation or condition so made or inserted shall be void.

Any such company which shall refuse the application of any such colored person for insurance upon such person's life shall furnish such person, on his request therefor, with the certificate of some regular examining physician of such company who made the examination, stating that such refusal was not because such applicant is a person of color, but solely upon such

grounds of the general health and prospect of longevity of such person as would be applicable to white persons of the same age and sex.

Surplus account in annual statement.

SECTION 70. Every life insurance company doing business in Massachusetts shall report in its annual statement the amount of forfeitures and undivided surplus on lapsed or terminated policies which it holds for or which is to accrue to the benefit of any class of its policy-holders, whether or not dividends thereof have been declared or allotment made, and whether or not liable for obligations of the company until distribution thereof is made; also the amount of surplus, not ordered to be distributed and not included in the annual statement as dividends due to policy-holders, and not appropriated to the permanent safety fund under the provisions of section seventy-five, accrued from and contributed by its policies in force.

Valuation of policies. Payment for. 1894, c. 19.

SECTION 71. Every life insurance company doing business in this Commonwealth shall annually pay into the treasury of the same, by the way of compensation for the valuation of its policies, two and one-half mills on every thousand dollars insured by it on lives.

Reinsurance by domestic life companies. P. S. 119, § 152.

SECTION 72. No domestic life insurance company shall reinsure its risks except by permission of the insurance commissioner; but may reinsure not exceeding one-half of any individual risk.

1895, c. 366.

No life insurance company organized under the laws of or doing business in this Commonwealth shall enter into any contract of insurance upon lives within this Commonwealth without having previously made or caused to be made a prescribed medical examination of the insured by a registered medical practitioner. Any insurance company violating this provision, or any officer, agent or other person soliciting or effecting, or attempting to effect, a contract of insurance contrary thereto, shall be deemed guilty of a misdemeanor and shall be punished by a fine not exceeding one hundred dollars for each offence.

Guaranty capital; dividends; redemption. P. S. 119, § 145.

The stockholders of the guaranty capital of any such company shall be entitled to such annual dividends not exceeding eight per cent., payable from the net surplus, as may have been agreed upon in the subscription thereof. Any such company may redeem its guaranty capital by appropriation of net surplus for that purpose whenever its members so vote.

Rights of creditor and of beneficiary. P. S. 119, § 167. 1892, c. 372. 1893, c. 434. 1894, c. 228.

SECTION 73. When a policy of insurance is effected by any person on his own life, or on another life in favor of some person other than himself having an insurable interest therein, the lawful beneficiary thereof, other than himself or his legal representatives, shall be entitled to its proceeds, against the creditors and representatives of the person effecting the same; and the person to whom a policy of life insurance, hereafter issued, is made payable may maintain an action thereon in his own name: *provided*, that, subject to the statute of limitation, the amount of any premiums for said insurance paid in fraud of creditors, with interest thereon, shall inure to their benefit from the proceeds of the policy; but the company issuing the policy shall be discharged of all liability thereon by payment of its proceeds in accordance with its terms, unless, before such payment, the company shall have written notice by or in behalf of some creditor, with specification of the amount claimed, claiming to recover for certain premiums paid in fraud of creditors.

1894, c. 120.

Every policy of life insurance made payable to or for the benefit of a married woman, or after its issue assigned, transferred, or in any way made payable to a married woman, or to any person in trust for her or for her benefit, whether procured by herself, her husband or by any other person, and whether the assignment or transfer is made by her husband or by any other person, shall inure to her separate use and benefit, and to that of her children, subject to the provisions of this section relating to premiums paid in fraud of creditors; and *provided, further*, that all such policies may be surrendered in the manner provided by section seventy-six of this act, which section shall apply to the same.

Policies to be valid, provided.

In any claim arising under a policy which has been issued in this Commonwealth by any life insurance company, without previous medical examination, or without the knowledge and consent of the insured, or, in case said insured is a minor, without the consent of the parent, guardian or other person having legal custody of said minor, the statements made in the application as to the age, physical condition, and family history of the insured shall be held to be valid and binding upon the company: *provided, however*, that the company shall not be debarred from proving as a defence to such claim that said statements were wilfully false, fraudulent or misleading; and

provided, further, that every policy which contains a reference to the application of the insured, either as a part of the policy or as having any bearing thereon, must have attached thereto a correct copy of the application, and unless so attached the same shall not be considered a part of the policy or received in evidence. Each application for such policy shall have printed upon it in large bold-faced type the following words: "Under the laws of Massachusetts, each applicant for a policy of insurance to be issued hereunder is entitled to be furnished with a copy of this application attached to any policy issued thereon."

Applicants to be furnished with copy of application.

Any solicitor, agent, examining physician or other person who shall knowingly or wilfully make any false or fraudulent statement or representation in or with reference to any application for insurance, or who shall make any such statement for the purpose of obtaining any fee, commission, money or benefit in any corporation transacting business under this act, shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred nor more than five hundred dollars, or imprisonment in the county jail for not less than thirty days nor more than one year, or both, at the discretion of the court; and any person who shall wilfully make a false statement of any material fact or thing in a sworn statement as to the death or disability of a policy or certificate holder in any such corporation, for the purpose of procuring payment of a benefit named in the certificate of such holder, shall be guilty of perjury, and shall be proceeded against and punished as provided by the statutes of the Commonwealth in relation to the crime of perjury.

Penalty for misstatement.

After the first day of October in the year eighteen hundred and ninety-four no life insurance company transacting business under this act shall issue any policy to a resident of this Commonwealth which does not bear in bold letters upon its face a plain description of the policy, so fully defining its character, including dividend periods and other peculiarities, that the holder thereof shall not be liable to mistake the nature or scope of the contract.

Policies to be described on face. 1894, c. 442.

Rights of Policy Holders in Domestic Mutual Life Companies.

Section 74. Every person insured by a domestic mutual life insurance company shall be a member, entitled to one vote, and one vote additional for each five thousand dollars of insur-

Policy-holders are members. Shall have notice of annual meetings.

ance in excess of the first five thousand dollars, and shall be notified of its annual meetings by written notice or by an imprint in the form prescribed in section forty, upon the back of each policy, receipt or certificate of renewal.

Votes and proxies. P. S. 119, § 153. Penalty. See § 107.

Members may vote by proxies dated and executed within three months, and returned and recorded on the books of the company seven days or more before the meeting at which they are to be used; but no person shall be allowed as proxy or otherwise to cast more than twenty votes, and no officer shall himself, or by another, ask for, receive, procure to be obtained, or use, a proxy vote.

Distribution of surplus. P. S. 119, §§ 147-150.

SECTION 75. Every such domestic life company shall annually, or once in every two, three, four or five years, as it shall determine, and as may be conditioned in its policies, make distribution of all surplus it may have accumulated since its last dividend or surplus. By such surplus is here intended all accumulations since its last distribution of surplus above its debts and reserve computed as provided in section eleven. The distribution shall be upon what is known as the contribution plan, and each member upon whose policy no premium is overdue and unpaid shall be entitled to the amount contributed by his policy to such surplus. Policies which have become payable before the time when such distribution is made, and after the date of the last previous distribution, shall share in the same equitably and proportionally: *provided*, that, besides the aggregate market value margin in excess of par of all bonds held by a company, and not included in its reserve, any such company may accumulate from its surplus and hold as a safety fund an amount not larger than ten per cent. of its required legal reserve. Such safety fund, or any part thereof, may be applied to supply any deficiency in the reserve caused by depreciation of assets or losses and expenses beyond the ability of the company to otherwise provide for. Upon the termination, by reason of death or maturity, of any policy hereafter issued upon which there has been no default in payment of premium, the amount payable thereon shall include, as a special distribution of surplus, such portion of the company's safety fund, if any, as may be determined by the following rule, viz.: If the company's surplus as shown by the last report of the insurance company, as made to the insurance commissioner, prior to the termination of the said policy, was a greater

Safety fund.

amount than was shown by the first report of the insurance company after the policy was issued, it shall be ascertained what percentage the net increase in surplus during that time is on the company's total distributions during the same interval, and the same percentage of the sum of all the distributions already paid on said policy shall constitute the special dividend.

Non-forfeiture of policies. Paid-up and cash surrender values. P. S. 119, §§ 159-165.

SECTION 76. All policies hitherto issued by any domestic life insurance company shall be subject to the provisions of law applicable and in force at the date of such issue. No policy of life or endowment insurance hereafter issued by any such company shall become forfeit or void for non-payment of premium after two full annual premiums, in cash or note, or both, have been paid thereon; but in case of default in the payment of any subsequent premium, then, without any further stipulation or act, such policy shall be binding upon the company for the amount of paid-up insurance which the then net value of the policy and all dividend additions thereon, computed by the rule of section eleven, less any indebtedness to the company on account of said policy, and less the surrender charge provided herein, will purchase as a net single premium for life or endowment insurance maturing or terminating at the time and in the manner provided in the original policy contract; and such default shall not change or affect the conditions or terms of the policy, except as regards the payment of premiums and the amount payable thereon. Said surrender charge shall be eight per cent. of the insurance value of the policy at the date of default, which insurance value is the present value of all the normal future yearly costs of insurance, which by its terms said policy is exposed to pay in case of its continuance, computed upon the rate of mortality and interest assumed in section eleven. Every such policy, after the payment of two full annual premiums thereon, or when by its terms it has become paid up, shall have a surrender value which shall be its net value, less the surrender charge, and less any indebtedness to the company on account of the said policy, and its holder may, upon any subsequent anniversary of its issue, surrender the same and claim and recover from the company such surrender value in cash. On policies of prudential or industrial insurance on which the weekly premiums are not more than fifty cents each, the surrender value in all cases shall be payable in cash. Upon surrender, on any anniversary of its issue, of a

Every policy to have a surrender value.

1896, c. 470.

Policy-holder to be paid in cash. 1894, c. 470.

policy which has become paid up after the payment of two full annual premiums, by force of the statute, upon default in payment of premium, the holder shall be entitled to its net value, payable in cash. But no surrender of a policy shall be made without the written assent of the person to whom the policy is made payable. Any condition or stipulation in the policy or elsewhere, contrary to the provisions of this section, and any waiver of such provisions by the insured, shall be void.

FOREIGN INSURANCE COMPANIES.

Foreign companies may be admitted to do business by resident agents, subject to laws. Agents. See §§ 91, 92.

SECTION 77. Foreign insurance companies, upon complying with the conditions herein set forth applicable to such companies, may be admitted to transact in this Commonwealth by constituted agents resident therein any class of insurance authorized by the laws of the Commonwealth, subject to all general laws now or hereafter in force relative to the duties, obligations, prohibitions and penalties of insurance companies, and subject to all laws applicable to the transaction of such business by foreign insurance companies and their agents: *provided*, that no provision of law which by its terms applies specifically to domestic life insurance companies shall thereby become applicable to foreign life insurance companies.

Foreign life companies. See § 67.

Conditions of Admission of Foreign Companies.

Before admission any such company must—

SECTION 78. No foreign insurance company shall be so admitted and authorized to do business until—

Deposit copy of charter and statement of condition, and pay fees therefor. R. L. P. S. 119, §§ 190, 202.

First, It shall deposit with the insurance commissioner a certified copy of its charter or deed of settlement and a statement of its financial condition and business, in such form and detail as he may require, signed and sworn to by its president and secretary or other proper officer, and shall pay for the filing of such copy the sum of thirty dollars, and for the filing of such statement the sum of twenty dollars.

Satisfy the commissioner that it is legally organized with sufficient capital or funds.

Second, It shall satisfy the insurance commissioner that it is fully and legally organized under the laws of its state or government to do the business it proposes to transact; that it has, if a stock company, a fully paid-up and unimpaired capital, exclusive of stockholders' obligations of any description, of an amount not less than is required of similar companies formed under the provisions of this act, and, if a mutual company, other than life, that it has net cash assets equal to the capital

If mutual company, must have cash assets in

required of like companies on the stock plan; or that it possesses net cash assets of not less than one hundred thousand dollars or net cash assets of not less than fifty thousand dollars, with also invested assets of not less than one hundred thousand dollars and, in each case, with additional contingent assets of not less than three hundred thousand dollars, and that such capital or net assets are well invested and immediately available for the payment of losses in this Commonwealth; and that it insures on any single hazard a sum no larger than one tenth of its net assets.

addition to contingent assets. 1896, c. 270.

Third, It shall by a duly executed instrument filed in his office constitute and appoint the insurance commissioner or his successor its true and lawful attorney, upon whom all lawful processes in any action or legal proceeding against it may be served, and therein shall agree that any lawful process against it which may be served upon its said attorney shall be of the same force and validity as if served on the company, and that the authority thereof shall continue in force irrevocable so long as any liability of the company remains outstanding in this Commonwealth. The service of such process shall be made by leaving the same in the hands or office of the commissioner. Copies of such instrument certified by the commissioner shall be deemed sufficient evidence thereof, and service upon such attorney shall be deemed sufficient service upon the principal.

Appoint the commissioner its attorney to accept service of lawful process. See § 14.

Fourth, It shall appoint as its agent or agents in the Commonwealth some resident or residents thereof.

Constitute an agent or agents in the Commonwealth.

Fifth, It shall obtain from the insurance commissioner a certificate that it has complied with the laws of the Commonwealth and is authorized to make contracts of insurance.

Obtain a certificate of authority to do business.

[See additional requirement, chap. 537, Acts of 1898, p. 69.]

SECTION 79. Such foreign company, if incorporated or associated under the laws of any government or state other than the United States or one of the United States, shall not be admitted until, besides complying with the conditions of section seventy-eight, it has made a deposit with the treasurer of the Commonwealth or with the financial officer of some other state of the United States, of a sum not less than the capital required of like companies under this act. Such deposit must be in exclusive trust for the benefit and security of all the company's policy-holders and creditors in the United States, and may be

Company of a foreign country must also make deposit, which shall be deemed its capital. P. S. 119, § 218.

made in the securities but subject to the limitations specified in section thirty-four of this act, and such deposit shall be deemed for all purposes of the insurance laws the capital of the company making it.

Shall transact but one class of insurance. P. S. 119, § 201.

SECTION 80. No foreign insurance company hereafter admitted to do business in the Commonwealth shall be authorized to transact more than one class or kind of insurance therein. But any company, domestic or foreign, engaged in this Commonwealth in the sole business of life insurance may, in connection therewith, also engage in the business of insuring against bodily injury or death by accident, by increasing its capital to the amount now required of two separate companies engaged in either one of these two classes of business; and no company now or hereafter admitted shall be allowed to transact both of said classes of business unless it possesses an aggregate capital equal to that required of two separate companies engaged in either one of these classes of business: *provided, however*, that a company authorized to transact within this Commonwealth the business of steam boiler insurance or the business authorized under the eighth paragraph of section twenty-nine of this act may also be permitted to transact the business authorized under the seventh paragraph of said section.

Two kinds of business. 1895, c. 474.

[Duly organized corporations of any other state authorized to transact the business of burglary insurance may be admitted to transact such business in this Commonwealth, upon the conditions required under chapter seventy-seven of the acts of the year eighteen hundred and ninety-four.] Chap. 124, Acts of 1896.

Funds held by trustees of company of foreign country, together with its deposits, to constitute its assets. P. S. 119, §§ 219, 220.

Appointment of trustees; commissioner may examine assets.

SECTION 81. Any admitted company of a foreign country may appoint trustees who are citizens of the United States and approved by the insurance commissioner, to hold funds in trust for the benefit of its policy-holders and creditors in the United States. Said trustees shall be named by the directors of the company and a certified copy of the record of the appointment of such trustees and of the deed of trust shall be filed in the office of the insurance commissioner, who may examine such trustees and the assets in trust and all books and papers relating thereto in the same manner that he may examine the officers, agents, assets and affairs of insurance companies. The funds so held by such trustees, so far as the same are in securities, money or credits admissible as sound assets in the

financial accounts of insurance companies, shall, together with its deposits made in accordance with section seventy-nine, constitute the assets of such company as regards its policy-holders and creditors in the United States.

Authority to do business may be revoked for violation of law, etc. See § 7.

SECTION 82. The authority of a foreign insurance company may be revoked if it shall violate or neglect to comply with any provision of law obligatory upon it, and whenever in the opinion of the insurance commissioner its condition is unsound, or its assets above its liabilities, exclusive of capital and inclusive of unearned premiums estimated as provided in section eleven, are less than the amount of its original capital or required unimpaired funds.

Fire Insurance in Unauthorized Companies.

Conditions under which unauthorized companies may lawfully insure property. 1885, c. 300. Penalty. See § 99. 1898, c. 380.

SECTION 83. The insurance commissioner, upon the annual payment of a fee of twenty dollars, may issue licenses to citizens of this Commonwealth, subject to revocation at any time, permitting the person named therein to procure policies of fire or bombardment insurance on property in this Commonwealth in foreign insurance companies not authorized to transact business in this Commonwealth. Before the person named in such a license shall procure any insurance in such companies on any property in this Commonwealth he shall in every case execute and file with the insurance commissioner an affidavit that he is unable to procure, in companies admitted to do business in the Commonwealth, the amount of insurance necessary to protect said property, and shall only procure insurance under such license after he has procured insurance in companies admitted to do business in this Commonwealth to the full amount which said companies are willing to write on said property: *provided*, that such licensed person shall not be required to offer any portion of such insurance to any company which is not possessed of cash assets amounting to at least twenty-five thousand dollars, or one which has, within the preceding twelve months, been in an impaired condition. Each person so licensed shall keep a separate account of the business done under the license, a certified copy of which account he shall forthwith file with the insurance commissioner, showing the exact amount of such insurance placed for any person, firm or corporation, the gross premium charged thereon, the companies in which the same is placed, the date of the policies and the term thereof, and also

Not required to offer insurance in certain companies. 1894, c. 147.

a report in the same detail of all such policies cancelled, and the gross return premiums thereon, and before receiving such license shall execute and deliver to the treasurer and receiver-general of the Commonwealth a bond in the penal sum of two thousand dollars, with such sureties as the treasurer and receiver-general shall approve, with a condition that the licensee will faithfully comply with all the requirements of this section, and will file with the treasurer and receiver-general, in January of each year, a sworn statement of the gross premiums charged for insurance procured or placed and the gross returned premiums on such insurance cancelled under such license during the year ending on the thirty-first day of December next preceding, and at the time of filing such statement will pay into the treasury of the Commonwealth a sum equal to four per cent. of such gross premiums, less such returned premiums so reported.

Miscellaneous Provisions.

Foreign companies to do business by agents in the state.

Policies not to be invalidated by war. P. S. 119, § 218.

SECTION 84. Foreign companies admitted to do business in the Commonwealth shall make contracts of insurance upon lives, property or interests therein, only by lawfully constituted and licensed resident agents. No policy of insurance issued to a citizen of the Commonwealth by an authorized company organized under the laws of a foreign country shall be invalidated by the occurrence of hostilities between such foreign country and the United States. And no company shall directly or indirectly contract for or effect reinsurance of any risk in Massachusetts with any company not authorized to do business therein, except as may be hereafter provided by law.

Not to reinsure in unauthorized companies. See §§ 20, 102. 1898, c. 537.

Tax to be paid by insuring company. 1883, c. 154.

Whenever any company negotiating insurance effects a reinsurance of any part thereof, otherwise than through licensed resident agents, the entire tax thereon shall be paid by the original insuring company and the tax commissioner shall make no deduction on account of such reinsurance.

Reciprocal Obligations.

Same conditions imposed upon companies of other states as such states impose on domestic companies. P. S. 119, § 215. See § 111.

SECTION 85. When by the laws of any other state any taxes, fines, penalties, licenses, fees, deposits or other obligations or prohibitions, additional to or in excess of those imposed by the laws of this Commonwealth upon foreign insurance companies and their agents, are imposed on insurance companies of this Commonwealth and their agents doing business in such state,

the same taxes, fines, etc., shall be imposed upon all insurance companies of such state and their agents doing business in this Commonwealth so long as such laws remain in force.

LLOYDS' ASSOCIATIONS.

How qualified for admission. P. S. 119, §176.

SECTION 86. Associations of individuals, citizens of the United States, whether organized within the Commonwealth or elsewhere within the United States, formed upon the plan known as Lloyds — whereby each associate underwriter becomes liable for a proportionate part of the whole amount insured by a policy — may be authorized to transact insurance other than life in this Commonwealth, in like manner and upon the same terms and conditions as are required of and imposed upon insurance companies of other of the United States.

AGENTS AND BROKERS.

Who deemed to be agents. P. S. 119, §§ 183, 184.

SECTION 87. Any person not a duly licensed insurance broker, who solicits insurance on behalf of any insurance company, or transmits for a person other than himself an application for or a policy of insurance to or from such company, or offers or assumes to act in the negotiation of such insurance, shall be deemed an insurance agent within the intent of this act, and shall thereby become liable to all the duties, requisitions, liabilities and penalties to which an agent of such company is subject.

Agents of domestic companies.

SECTION 88. Any officer of, or person appointed as its agent for that purpose by a domestic insurance company, or acting without compensation, may, without other qualification, act in the negotiation and transaction with such company of any insurance which such company may lawfully do.

Liability of agents on contracts unlawfully made. P. S. 119, § 210.

SECTION 89. An insurance agent shall be personally liable on all contracts of insurance unlawfully made by or through him, directly or indirectly, for or in behalf of any company not authorized to do business in the Commonwealth.

Company bound by payment of premium to agent or broker. P. S. 119, § 194.

SECTION 90. An insurance agent or broker who acts for a person other than himself in negotiating a contract of insurance by an insurance company shall, for the purpose of receiving the premium therefor, be held to be the company's agent, whatever conditions or stipulations may be contained in the policy or contract; such agent or broker knowingly procuring by fraudulent representations payment, or an obligation for the payment,

Penalty on agent for fraudulent representations. P. S. 119, § 185.

of a premium of insurance, shall be punished by fine of not less than one hundred nor more than one thousand dollars, or by imprisonment for not more than one year.

Agents of Foreign Companies.

Agents of foreign companies not to act without license. P. S. 119, § 209. Penalty. See § 98.

SECTION 91. No officer or agent of a foreign insurance company shall make or procure to be made, or act or aid in any manner in the negotiation of, any insurance with such company until he shall procure from the insurance commissioner a certificate of authority so to do, which shall state in substance that the company is authorized to do business in the Commonwealth, and that the person named therein is the constituted agent of the company for the transaction of such business.

Appointment and certificate of agent.

Upon written notice by such company of its appointment of a suitable person to act as its agent within the Commonwealth, and the payment of a fee of two dollars, the insurance commissioner shall, if the facts warrant it, grant such certificate. Such certificate shall continue in force until the first day of April next after its issue, and, by renewal thereof on the annual payment for such renewal of a fee of two dollars before the first day of April of each year, until revoked by the commissioner for non-compliance with the laws or until the appointment of the agent is revoked by written notice from the company to that effect, filed with the insurance commissioner.

Company bound by acts of its agent.

While such certificate remains in force the company shall be bound by the acts of the person named therein within his apparent authority as its acknowledged agent.

Agent to exhibit on sign, cards, etc., the state or country, etc., of the company he acts for. P. S. 119, § 205.

SECTION 92. Every person acting for a foreign insurance company shall exhibit in conspicuous letters, on the sign designating his place of business, the name of the state or country under whose authority the company he represents has been incorporated or formed. And said company and agent shall also have printed in large type the name of such state or country and the kind of office, whether chartered or formed as a mutual or stock company, upon all policies issued to citizens of this Commonwealth, on all cards, placards and pamphlets, and in all advertisements published, issued or circulated in this Commonwealth by them or him, relating to the business of such company.

Certain agents to make returns. 1897, c. 83.

Every agent of a foreign insurance company shall, on or before the fifteenth day of November in each year, make return

to the tax commissioner of all business transacted by him as such agent during the year ending with the thirty-first day of October then next preceding, in such form as the tax commissioner may prescribe; and all books, papers and accounts of his agency shall be open to the inspection of the tax commissioner at any time whenever he may deem it proper to verify the statements and transactions aforesaid. If such agent neglects or refuses to make such return, or refuses to submit the books, papers and accounts of his agency to such inspection, the tax commissioner shall report such neglect or refusal to the insurance commissioner, who shall thereupon cancel the certificate of authority to such agent and make publication thereof, in such manner as the commissioner shall deem necessary, and the certificate so cancelled shall not be renewed within one year thereafter; but only such agents shall be subject to this provision as are not accountable to any other agent in the Commonwealth for premiums received.

Commissioner to cancel license. 1896, c. 402.

Insurance Brokers.

SECTION 93. Whoever, for compensation, acts or aids in any manner in negotiating contracts of insurance or reinsurance or placing risks or effecting insurance or reinsurance for a person other than himself, and not being the appointed agent or officer of the company in which such insurance or reinsurance is effected, shall be deemed an insurance broker, and no person shall act as such broker save as provided in this section.

Who is an insurance broker. Not to act without license. 1869, c. 93. P. S. 119, §§ 186, 187. Penalty. See § 98.

The insurance commissioner may, upon the payment of a fee of ten dollars, issue to any suitable person, a resident of this Commonwealth or a resident of any other state granting licenses to residents of this Commonwealth, a certificate of authority to act as an insurance broker to negotiate contracts of insurance or reinsurance or place risks or effect insurance or reinsurance with any qualified domestic insurance company or its agents, and with the authorized agents in the Commonwealth of any foreign insurance company duly admitted to do business in the Commonwealth.

Commissioner may license broker. 1895, c. 50. 1896, c. 448. Fee for certificate.

Such certificate shall remain in force for one year unless revoked by the commissioner for cause. Such cause shall exist upon conviction of the holder of such certificate of a violation of the insurance laws, and whenever it shall appear to the commissioner upon due proof after notice that the holder has

Revocation of license if holder violates the law, or neglects to pay over premiums.

unreasonably failed and neglected to pay over to the company or agent entitled thereto any premium or part thereof collected by him on any policy of insurance. The commissioner shall publish such revocation in such manner as he deems for the protection of the public.

1895, c. 150. The insurance commissioner may issue a certificate of authority to act as an insurance broker, without the payment of any fee therefor, to any soldier or sailor resident in this Commonwealth who served in the army or navy during the war of the rebellion and who received an honorable discharge from such service, upon satisfactory evidence of the identity of such soldier or sailor.

DEPOSITS WITH THE STATE TREASURER.

[See also 1893, chap. 294.]

Treasurer to hold deposits of insurance companies. P. S. 119, §§ 156, 215, 218. 1883, c. 107. 1884, c. 119.

SECTION 94. The treasurer of the Commonwealth in his official capacity shall take and hold in trust deposits made by any domestic insurance company for the purpose of complying with the laws of any other state to enable such company to do business in such state; and shall also in like manner take and hold any deposit made by a foreign insurance company under any law of the Commonwealth. The company making such deposit shall be entitled to the income thereof, and may from time to time with the consent of the treasurer, when not forbidden by the law under which the deposit is made, change in whole or part the securities which compose the deposit, for other competent securities of equal par value.

Companies entitled to income of deposits and may exchange securities.

Treasurer may return deposits, when.

Upon request of any domestic insurance company the said treasurer may return to such company the whole or any portion of the securities of such company held by him on deposit, when he shall be satisfied that the securities so asked to be returned are subject to no liability and not required to be longer held by any provision of law or purpose of the original deposit. And he may return to the trustees or other representative authorized for that purpose of a foreign insurance company, any deposit made by such company when it shall appear that such company has ceased to do business in the Commonwealth and is under no obligation to policy-holders or other persons in the Commonwealth or in the United States, for whose benefit such deposit was made.

Trust in deposit may be enforced in equity suit.

An insurance company which has made such deposit, or its trustees or resident manager in the United States, or the insur-

ance commissioner, or any creditor of such company, may at any time bring, in the supreme judicial court for the county of Suffolk, a suit in equity against the Commonwealth and other parties properly joined therein, to enforce, administer or terminate the trust created by such deposit. The process in such suit shall be served on the treasurer of the Commonwealth, who shall appear and answer in its behalf and perform such orders and decrees as the court may make thereupon.

Treasurer to answer for Commonwealth and perform decrees of court.

RECEIVERS OF INSURANCE COMPANIES.

SECTION 95. The compensation of receivers of insolvent insurance companies shall be fixed by the supreme judicial court. All accounts rendered to the court by such receivers shall be referred to the insurance commissioner for his examination and report thereon.

Compensation. P. S. 119, §§ 168–172. 1883, c. 258. Accounts.

Such receivers, at the expiration of one year from final settlement ordered by the court, or, if they then have in their hands for distribution or deposit moneys or dividends uncalled for, when the same shall be paid into the treasury of the Commonwealth as provided in chapter two hundred and fifty-eight of the acts of the year eighteen hundred and eighty-three, and their final account allowed by the court, shall deposit with the insurance commissioner, together with all papers and records relating to their receiverships, all books and papers of such insolvent companies.

Deposit of books with commissioner.

ANNUAL STATEMENTS.

SECTION 96. Every insurance company shall annually, on or before the fifteenth day of January, file in the office of the insurance commissioner, a statement which shall exhibit its financial condition on the thirty-first day of December of the previous year, and its business of that year. For good cause shown the commissioner may extend the time within which any such statement may be filed, but not to a date later than the fifteenth day of February.

All companies to make annual statements. P. S. 119, §§ 226, 230. 1884, c. 217. Penalty. See § 101. 163 Mass. 276.

Every such annual statement shall be in the form and of the specifications the insurance commissioner may require, who shall embody therein, so far as appropriate to the several companies, the substance of the appended forms, together with any additional inquiries he may consider fit in order to elicit a complete and accurate exhibit of the conditions and transactions of the companies. The assets and liabilities shall be computed and

Form of statement. How verified. Penalty for neglect and false statement. See § 101.

allowed in such statement in accordance with the rules stated in section eleven. Such statement shall be subscribed and sworn to by the president and secretary, or, in their absence, by two of its principal officers.

By companies of foreign countries.

The annual statement of a company of a foreign country shall embrace only its business and condition in the United States, and shall be subscribed and sworn to by its resident manager or principal representative in charge of its American business.

Fee for filing.

For filing each annual statement each foreign company shall pay to the Commonwealth the sum of twenty dollars.

New business after default unlawful.

The transaction of any new business by any company or its agents after neglect to file a statement in the manner herein provided shall be unlawful.

PENALTIES, FORFEITURES, ETC.

Complainant in certain cases entitled to one half of fine. P. S. 119, § 182.

SECTION 97. The person, if other than the insurance commissioner or his deputy, upon whose complaint a conviction is had for violation of the law prohibiting insurance in or by foreign companies not authorized to do business in the Commonwealth, shall be entitled to one half of the fine recovered upon sentence therefor.

Negotiation of unlawful contracts. Agents and brokers. See §§ 3, 91.

SECTION 98. Any person who shall assume to act as an insurance agent or insurance broker without license therefor as herein provided, or who shall act in any manner in the negotiation or transaction of unlawful insurance with a foreign insurance company not admitted to do business in this Commonwealth, or who as principal or agent shall violate any provision of this act in regard to the negotiation or effecting of contracts of insurance, shall be punished by fine of not less than one hundred nor more than five hundred dollars for each offence.

Unlawful acts of licensed persons. See § 83.

SECTION 99. Any person licensed under the provisions of section eighty-three, who shall procure or act in any manner in the procurement or negotiation of insurance in any unauthorized foreign company, and shall neglect to make and file the affidavit and statements as such section provides, or shall wilfully make a false affidavit or statement, shall forfeit his license and be punished by a fine of not less than one hundred nor more than five hundred dollars, or by imprisonment for not more than one year or by both.

Illegal advertisements. See § 18.

SECTION 100. Any company or any agent thereof issuing or circulating advertisements in violation of section eighteen shall be punished by fine of not less than fifty nor more than five hundred dollars.

Neglect to make returns.

SECTION 101. Any company that neglects to make and file its annual statement in the form and within the time provided by section ninety-six shall forfeit one hundred dollars for each day's neglect, and upon notice by the insurance commissioner to that effect its authority to do new business shall cease while such default continues. For wilfully making a false annual or other statement it is required by law to make, an insurance company and the persons making oath to or subscribing the same shall severally be punished by fine of not less than five hundred nor more than five thousand dollars. Any person making oath to such false statement shall be deemed guilty of the crime of perjury.

False returns. See §§ 19, 98.

Reinsurance in unauthorized companies. See § 20.

SECTION 102. For making any reinsurance in violation of section twenty an insurance company and the agent effecting or acting in the negotiation of such reinsurance shall severally be punished by fine of five hundred dollars.

Over-insurance. See §§ 20, 86.

SECTION 103. Any insurance company that shall insure upon a single risk a larger amount than the law permits, shall be punished by fine of five hundred dollars.

Issue of life policy after notice of impairment. See § 66.

SECTION 104. Any officer or agent of a life insurance company who shall issue a new policy, after notice by the commissioner, in violation of section sixty-six, shall for each offence forfeit a sum not exceeding one thousand dollars.

Issue of fire policy other than standard form. See § 60.

SECTION 105. Any insurance company or agent who shall make, issue or deliver a policy of fire insurance in wilful violation of section sixty shall forfeit for each offence not less than fifty nor more than two hundred dollars; but such policy shall nevertheless be binding upon the company issuing the same.

Unlawful guarantee to policy-holder. See § 50.

SECTION 106. Any director or other officer of a mutual fire insurance company who either officially or privately gives a guarantee to a policy-holder thereof against an assessment to which such policy-holder would otherwise be liable shall be punished by fine not exceeding one hundred dollars for each offence.

Proxy vote by officer or agent. See §§ 40, 74.

SECTION 107. Any paid officer or agent of a domestic mutual insurance company who shall ask for, receive, procure to be obtained or use a proxy vote in violation of section forty or

section seventy-four shall be punished for each offence by a fine of not less than one hundred nor more than three hundred dollars.

Obstruction of commissioner in examinations. Witness in default. See § 6.

SECTION 108. Whoever, without justifiable cause, neglects upon due summons to appear and testify before the commissioner as provided in section six, and whoever obstructs the commissioner, his deputy or examiner, in his examination of an insurance company, shall be punished by fine of not more than one thousand dollars or by imprisonment for not more than one year.

Color discrimination. See § 69.

SECTION 109. Any life company or officer or agent thereof violating any of the provisions of section sixty-nine shall be punished by fine of not more than one hundred dollars for each offence.

Other violations.

SECTION 110. For violation of any provision of this act the penalty whereof is not specifically provided for herein, the offender shall be punished by fine of not more than five hundred dollars.

Enforcement of reciprocal obligations.

SECTION 111. Compliance with the provisions of section eighty-five as to deposits, obligations and prohibitions, and the payment of taxes, fines, fees and penalties by and upon foreign insurance companies, may be enforced in the ordinary course of equity procedure by information brought in the supreme judicial court by the attorney-general at the relation of the insurance commissioner.

Agent or broker, when to be deemed to be guilty of larceny. P. S. c. 203, § 47.

An insurance agent or broker who acts in negotiating a contract of insurance by an insurance company lawfully doing business in this Commonwealth, and who embezzles or fraudulently converts to his own use, or with intent to use or embezzle, takes, secretes or otherwise disposes of, or fraudulently withholds, appropriates, lends, invests or otherwise uses or applies any money or substitute for money received by him as such agent or broker, contrary to the instructions or without the consent of the company for or on account of which the same was received by him, shall be deemed guilty of simple larceny.

Repeal, effect of.

SECTION 112. The provisions of this act, so far as they are the same as those of existing laws, shall be construed as a continuation of such laws and not as new enactments; and the repeal by this act of any provision of law shall not affect any act done, liability incurred or any right accrued and established, or any suit or prosecution, civil or criminal, pending or

to be instituted to enforce any right or penalty or punish any offence under the authority of the repealed laws; and any person who at the time when said repeal takes effect holds office under any of the laws repealed shall continue to hold such office according to the tenure thereof, unless such office is abolished or a different provision is herein made. All acts and parts of acts inconsistent herewith are hereby repealed.

FORMS.

A.— *Form of Return for Stock Insurance Companies, except Life.*

(1.) State the name of the company. (2.) Where located. (3.) When incorporated and for what period. (4.) Amount of capital. (5.) Amount of capital actually paid in. (6.) Cash value of real estate owned. (7.) Amount loaned on mortgage of real estate. (8.) Amount and description of each kind of bonds and stocks owned, with par and market value. (9.) Amount loaned on collateral; par and market value of each security pledged. (10.) Amount of cash on hand. (11.) Amount of gross premiums in course of collection. (12.) Amount of bills receivable, not matured, taken for premiums. (13.) Amount of all other property or investments. (14.) All outstanding losses. (15.) Amount of unearned premiums on policies in force. (16.) All other liabilities and claims against the company. (17.) Amount of cash received for premiums. (18.) Amount of notes received for premiums. (19.) Amount received for interest and rents. (20.) Amount of income received from all other sources. (21.) Amount paid for losses. (22.) Amount paid for dividends. (23.) Amount paid for expenses. (24.) All other expenditures. (25.) State amount of risks written, terminated and in force, with gross premiums thereon.

B.— *Form of Return of Mutual Companies, except Life.*

(1.) State the name of the company. (2.) Where located. (3.) When incorporated and for what period. (4.) Amount of guarantee fund, if any. (5.) Cash value of real estate owned. (6.) Amount loaned on mortgage of real estate. (7.) Amount and description of each kind of stocks and bonds owned, with par and market value. (8.) Loans on collateral, with par and market value of each security pledged. (9.) Cash in office and in bank. (10.) Gross premiums in course of collection. (11.) All other loans, investments and property. (12.) Premium notes liable to assessment. (13.) Amount of scrip outstanding. (14.) All outstanding losses. (15.) Unearned premiums. (16.) Dividends declared and unpaid. (17.) Borrowed money. (18.) All other liabilities and claims against the company. (19.) Cash received for premiums. (20.) Cash received for interest

and rent. (21.) Premium notes received. (22.) Income from all other sources. (23.) Paid for losses. (24.) Paid for expenses. (25.) Surplus returned to policy-holders. (26.) All other expenditures. (27.) Scrip dividends declared. (28.) State amount of risks written, terminated and in force, with gross premiums thereon.

C. — *Form of Return of Life Insurance Companies.*

(1.) The name of the company. (2.) Where located. (3.) When incorporated and for what period. (4.) Amount of capital stock or guarantee fund. (5.) Cash value of real estate owned. (6.) Amount loaned on mortgages of real estate. (7.) Amount and description of each kind of bonds and stocks owned, with par and market value. (8.) Loans on collateral, with par and market value of each security pledged. (9.) Cash in office and in bank. (10.) Premium notes and loans on policies in force. (11.) Outstanding and deferred premiums on policies in force. (12.) All other loans, investments and property. (13.) All outstanding losses and policy claims. (14.) Dividends of surplus due policy-holders. (15.) Forfeitures and surplus accrued, held for and to be divided to any special class of policy-holders; surplus accrued on policies in force, not yet due to be distributed. (16.) All other liabilities and claims against the company. (17.) Cash received for premiums. (18.) Cash received for interest and rent. (19.) Income from all other sources. (20.) Paid for losses and claims. (21.) Dividends of surplus to policy-holders. (22.) Paid for expenses. (23.) All other expenditures. (24.) Number, date, amount and kind of each outstanding policy not heretofore returned, gross premium thereon, and age of the insured. (25.) Number, date and amount of each policy which has within the year ceased to be in force, how terminated, what has been paid to the legal holder of the policy, and age of the insured. *Approved June 25, 1894.*

[CHAP. 381, ACTS OF 1894.]

An Act relative to the Admission of Certain Foreign Corporations to do Business in this Commonwealth.

Be it enacted, etc., as follows:

Foreign corporations may not transact business not permitted domestic.

SECTION 1. It shall be unlawful for any corporation, association or organization of another state or country, except life insurance companies as provided in chapter two hundred and fourteen of the acts of the year eighteen hundred and eighty-seven, to engage or continue in the Commonwealth in any kind of business the transaction of which by domestic corporations is not permitted by the laws of the Commonwealth. The commissioner of corporations, the insurance commissioner, and any

other officer of the Commonwealth whose duty it is to examine and decide whether a corporation, association or other organization is privileged to file any papers under chapter three hundred and thirty of the acts of the year eighteen hundred and eighty-four, chapter two hundred and fourteen of the acts of the year eighteen hundred and eighty-seven, chapter four hundred and twenty-one of the acts of the year eighteen hundred and ninety, chapter forty of the acts of the year eighteen hundred and ninety-two, or any act in amendment thereof, shall refuse to accept or file the charter, financial statement or other papers, or accept appointment as attorney for service for any corporation, association or other organization doing a business in this Commonwealth, the transaction of which by domestic corporations is not then permitted by the laws of the Commonwealth.

SECTION 2. This act shall take effect upon the first day of January in the year eighteen hundred and ninety-five.

Approved May 12, 1894.

[CHAP. 537, ACTS OF 1898.]

An Act relative to Reinsurance Contracts.

Be it enacted, etc., as follows:

Foreign companies to file declaration relative to reinsurance prior to admission.

SECTION 1. Whenever an application for admission to this Commonwealth is made by a company, whether of another state of the United States or of a foreign country, for the transaction of the business of fire insurance herein, such company shall, as one of the prerequisites of admission, file a sworn declaration, signed by its president and secretary, or officers corresponding thereto, that it will not reinsure any risk or part thereof taken by it on any property located in Massachusetts with any company not authorized to transact the business of fire insurance in said Commonwealth, except as is hereinafter provided. Every fire insurance company now or hereafter admitted, shall annually and at such other times as the insurance commissioner may require, in addition to all returns now by law required of it or its agents or managers, make a return to the insurance commissioner in such form and detail as may be prescribed by him, of all reinsurance contracted for or effected by it, directly or indirectly, upon property located in Massachusetts, such return

To make annually returns of reinsurance effected.

to be certified by the oath of its president and secretary if a company of one of the United States, and, if a company of a foreign country, by its president and secretary, or by officers corresponding thereto, as to reinsurance as aforesaid contracted for or effected through the foreign office, and by the United States manager as to such reinsurance effected by the United States branch; and if any company shall directly or indirectly reinsure any risk taken by it on any property located in Massachusetts in any company not duly authorized to transact business herein, or if it shall refuse or neglect to make the returns required by this act, the insurance commissioner may revoke its authority to transact business in this Commonwealth: *provided, however*, that any company authorized to do business in this Commonwealth may insure and have full authority to reinsure in unauthorized companies any property located in Massachusetts in respect to which an affidavit has been filed within the twelve months next preceding in accordance with the provisions of section eighty-three of chapter five hundred and twenty-two of the acts of the year eighteen hundred and ninety-four, in which case the restrictive provision of section twenty of the same chapter as to the amount which may be insured in a single hazard shall not apply.

Authority may be revoked, etc.

May insure or reinsure affidavit risks.

Sect. 84, c. 522, Acts of 1894, amended.

SECTION 2. Section eighty-four of chapter five hundred and twenty-two of the acts of the year eighteen hundred and ninety-four is hereby amended by striking out in the ninth line, the words "of another state or government", and by inserting after the word "therein", in the twelfth line, the words: — except as may be hereafter provided by law, — so as to read as follows: — *Section 84.* Foreign companies admitted to do business in the Commonwealth shall make contracts of insurance upon lives, property or interests therein, only by lawfully constituted and licensed resident agents. No policy of insurance issued to a citizen of the Commonwealth by an authorized company organized under the laws of a foreign country shall be invalidated by the occurrence of hostilities between such foreign country and the United States. And no company shall directly or indirectly contract for or effect reinsurance of any risk in Massachusetts with any company not authorized to do business therein, except as may be hereafter provided by law.

Whenever any company negotiating insurance effects a reinsurance of any part thereof, otherwise than through licensed

resident agents, the entire tax thereon shall be paid by the original insuring company and the tax commissioner shall make no deduction on account of such reinsurance.

Maximum limit of risk to be retained by a marine company.

SECTION 3. Any insurance company authorized to do marine business in this Commonwealth may take any risk provided it reinsures the same, if necessary, so that it does not retain for itself of the risk an amount exceeding ten per cent. of its capital and surplus wherever they may be, and also provided that it shall place such reinsurance, if possible, at the time and at not over the original rate, with companies authorized to do marine insurance in Massachusetts; any amount in excess of what can be so placed may be reinsured with other companies, if the company or agent procuring said risk shall file an affidavit to that effect with the insurance commissioner, at such time and in such form as may be prescribed by him.

Shall file affidavit of reinsurance in unauthorized company.

SECTION 4. This act shall take effect upon its passage.

Approved June 17, 1898.

[CHAP. 229, ACTS OF 1899.]

An Act relative to Domestic and Foreign Mutual Assessment Life Insurance Corporations.

Be it enacted, etc., as follows:

SECTION 1. Any corporation of this Commonwealth now authorized to transact the business of life insurance, under chapter four hundred and twenty-one of the acts of the year eighteen hundred and ninety and acts in amendment thereof, may, by vote of a majority of its members present and voting at a special meeting called for that purpose, of which meeting a written or printed notice shall have been mailed to each member at least ten days before the date fixed for such meeting, accept the provisions of this act and the provisions of chapter five hundred and twenty-two of the acts of the year eighteen hundred and ninety-four and of acts in amendment thereof relative to life insurance, and shall thereafter, except as herein specifically provided, transact business in accordance with and be governed by the provisions of said acts.

SECTION 2. A copy of the vote of the members designated in section one of this act, sworn to by the president and secretary and a majority of the board of directors as being a true copy, shall be filed with the insurance commissioner, who

shall issue to such corporation a certificate of authority to transact the business of life insurance, in accordance with the provisions of this act and of said chapter five hundred and twenty-two, so far as the same may be applicable.

SECTION 3. Any corporation organized under authority of any other of the United States to insure lives on the assessment plan and now doing business in this Commonwealth, shall upon compliance with this act be relicensed and authorized to transact a general life insurance business in this Commonwealth, upon filing with the insurance department of the state all the papers and documents and making the payments required under the Massachusetts insurance act of eighteen hundred and ninety-four and acts in amendment thereof, so far as the same are or may be applicable, and all business thereafter transacted by such corporation shall be done in accordance with and governed by the provisions of said chapter five hundred and twenty-two, except as provided in this act.

SECTION 4. Every such corporation of this state, or of any other of the United States, upon complying with the requirements of this act, is hereby authorized to carry out in good faith its contracts heretofore made with its members, but all policies or certificates of insurance heretofore issued by such corporations and now remaining in force which contain a provision for a payment other than the premium stipulated therein, and under which the duration of premium payments is co-equal with the duration of the contract, endowment policies and endowment certificates excepted, shall be valued and reserve maintained thereon on the basis of renewable term insurance as fixed by attained age, in accordance with the provisions of said chapter five hundred and twenty-two and of acts in amendment thereof. To the reserve liability determined as above the insurance commissioner shall add the determinate contract reserve under any other policies or certificates heretofore issued and remaining in force, and in the absence of such contract reserve shall value them as contracts providing similar benefits are to be valued under the provisions of said chapter five hundred and twenty-two: *provided*, that under no policy or certificate shall a greater aggregate reserve liability be charged than is required by said chapter.

SECTION 5. After the first day of July in the year eighteen hundred and ninety-nine no policy or certificate of life insurance

under the provisions of chapter four hundred and twenty-one of the acts of the year eighteen hundred and ninety and of acts in amendment thereof shall be issued by any such corporation, unless made subject to and in compliance with the provisions of this act. All policies of life insurance issued by any such corporation after said date, whether or not they contain a provision for a payment other than the premium specified therein, shall be valued, taking the first year as one year term insurance, and the reserve maintained thereon, according to the provisions of said chapter five hundred and twenty-two and of acts in amendment thereof: *provided, however*, that the following words of this section, "taking the first year as one year term insurance," shall not apply to any policies issued on or after the first day of January in the year nineteen hundred and three.

SECTION 6. All parts of chapter four hundred and twenty-one of the acts of the year eighteen hundred and ninety and of acts in amendment thereof which relate to the formation of corporations to transact the business of life insurance, or which provide for the regulation of the business of life insurance by such corporations, and all other provisions of said acts, except such as relate solely to the formation and regulation of corporations organized for the transaction of accident or casualty insurance, and chapter five hundred and fifteen of the acts of the year eighteen hundred and ninety-six, are hereby repealed.

SECTION 7. All acts and parts of acts inconsistent with the provisions of this act are hereby declared not to be applicable to any such corporations organized under chapter four hundred and twenty-one of the acts of the year eighteen hundred and ninety and acts in amendment thereof.

SECTION 8. This act shall take effect on the first day of July in the year eighteen hundred and ninety-nine.

Approved April 1, 1899.

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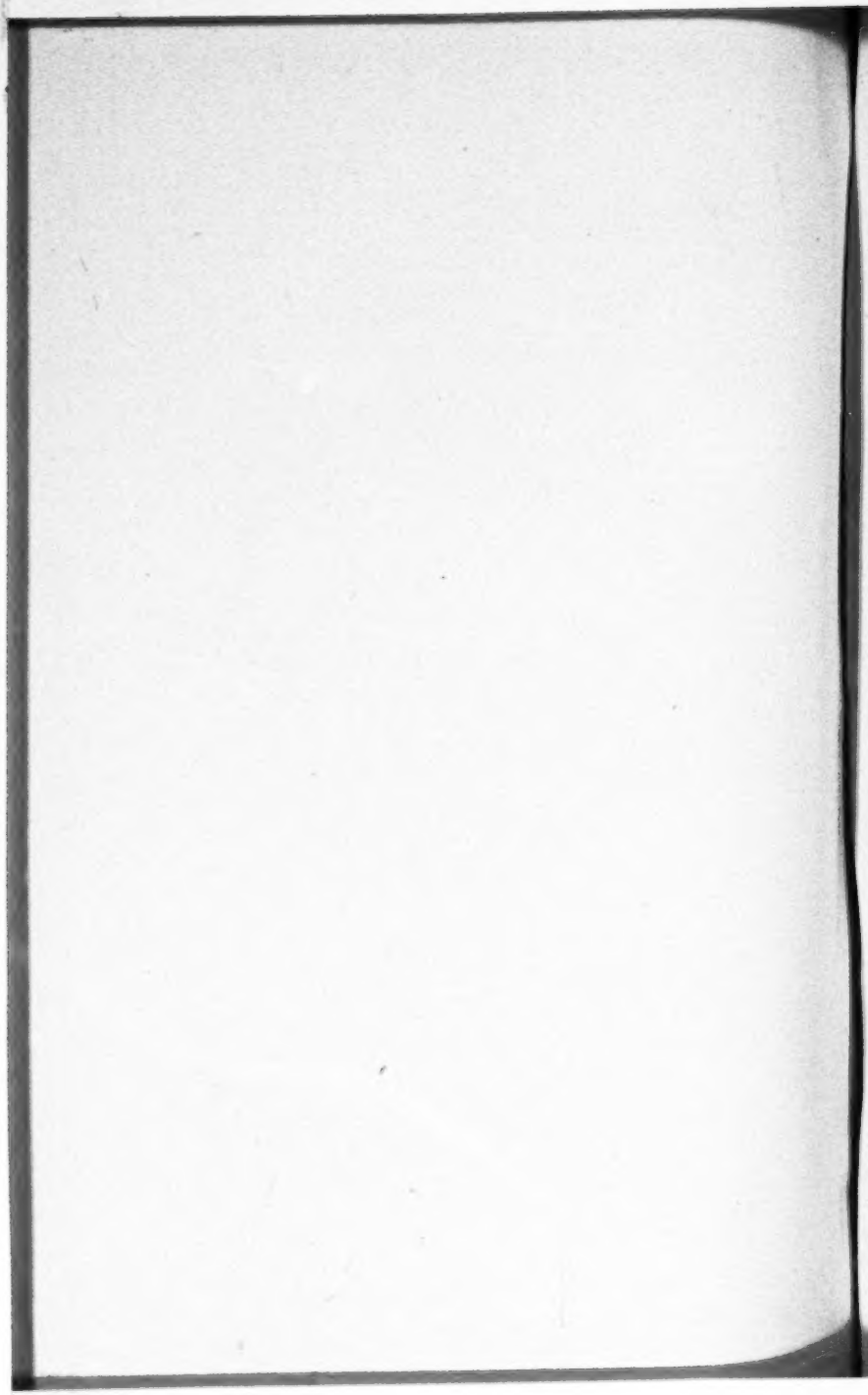

Supreme Court of the United States.

No. 32.—October Term, 1901.

Charles H. Nutting, Plaintiff in Error, } In error to the Superior Court
vs. } of the State of Massachusetts.
The Commonwealth of Massachusetts. }

This was an indictment on the statute of Massachusetts of 1894, c. 522, § 98, for negotiating and transacting unlawful insurance with a foreign insurance company not admitted to do business in Massachusetts.

Section 98 of that act is as follows: "Any person who shall assume to act as an insurance agent or insurance broker without license therefor as herein provided, or who shall act in any manner in the negotiation or transaction of unlawful insurance with a foreign insurance company not admitted to do business in this Commonwealth, or who as principal or agent shall violate any provision of this act in regard to the negotiation or effecting of contracts of insurance, shall be punished by fine of not less than one hundred nor more than five hundred dollars for each offence."

The act, in section 3, provides that "it shall be unlawful for any company to make any contract of insurance upon or concerning any property or interests or lives in this Commonwealth, or with any resident thereof, or for any person as insurance agent or insurance broker to make, negotiate, solicit or in any manner aid in the transaction of such insurance, unless and except as authorized under the provisions of this act;" and that "all contracts of insurance on property, lives or interests in this Commonwealth shall be deemed to be made therein." And in sections 77–82 it prescribes the conditions with which foreign insurance companies must comply before they can do business in Massachusetts, requiring each company, among other things, to appoint the insurance commissioner its attorney, upon whom process in any suit against it may be served; to appoint some resident of Massachusetts as its agent; to obtain from the insurance commissioner a certificate that it has complied with the laws of Massachusetts and is authorized to make contracts of insurance; and, if incorporated or associated under the laws of any government other than the United States or one of the States, to deposit with the treasurer of Massachusetts or the financial officer of some other State a sum equal to the capital required of like companies, to be held in trust for the benefit of all the company's policy-holders and creditors in the United States.

At the trial in the Superior Court, the parties agreed upon the following facts: The defendant was a citizen of Massachusetts and a licensed

insurance broker in Boston, and at some time prior to November 18, 1898, solicited from one William McKie, a shipbuilder in Boston, and likewise a citizen of Massachusetts, the business of procuring insurance upon a vessel then in process of construction in his Boston shipyard; and, as agent for Johnson & Higgins, average adjusters and insurance brokers, having an office in Boston in charge of the defendant, and their principal place of business in New York, secured the authority of McKie to the placing of a contract of insurance for £4124 upon the vessel. Thereupon the defendant transmitted an order for the insurance to Johnson & Higgins in New York, and they at once wrote to their Liverpool agents, John D. Tyson & Co., to procure the aforesaid insurance. Accordingly, Tyson & Co. procured a policy from the London Lloyds, to be delivered to Tyson & Co. in Liverpool, dated November 18, 1898, for a year from November 16, 1898, on the aforesaid vessel, for the sum of £4124, the policy running in favor of Johnson & Higgins "on account of whom it may concern, as well in their own name as for and in the name and names of all and every other person or persons to whom the same doth, may or shall appertain." Tyson & Co. at the time of receiving the policy paid the premiums thereon for account of Johnson & Higgins, and received a commission upon the insurance from Lloyds for themselves and for Johnson & Higgins. Tyson & Co. sent the policy to Johnson & Higgins in New York; they, after endorsing it, forwarded it by mail to the defendant in Boston; and he, on November 18, 1898, sent it by mail to McKie. The policy was procured from the London Lloyds in the usual course of the business of the defendant, of Johnson & Higgins and of Tyson & Co. None of them were agents of the London Lloyds, except in so far as the facts agreed constituted them agents. The London Lloyds were individual insurers, citizens of England, associated as principals in the business of insurance, under and by authority of the government of the United Kingdom of Great Britain and Ireland, and carrrying on the business in England on the Lloyds' plan, by which each associate underwriter becomes liable for a proportionate part of the whole amount insured by a policy. The London Lloyds had not complied with any of the requirements imposed by the laws of Massachusetts upon foreign insurance companies, and had not been admitted to do insurance business in the Commonwealth, according to law.

The defendant requested the court to instruct the jury that so much of the Massachusetts statute as purported to make illegal such acts as were done by the defendant was contrary to the Fourteenth Amendment of the Constitution of the United States, and as such was unconstitutional and void. The request was refused; and the court instructed the jury that upon the facts above stated they would be warranted in finding the defendant guilty. To all of this the defendant duly excepted, and being

found guilty, his exceptions were overruled by the Supreme Judicial Court of Massachusetts. 175 Mass. 154. He was thereupon sentenced in the Superior Court, and sued out this writ of error.

[January 13, 1902.]

Mr. Justice GRAY, after stating the case as above, delivered the opinion of the Court.

A State has the undoubted power to prohibit foreign insurance companies from making contracts of insurance, marine or other, within its limits, except upon such conditions as the State may prescribe, not interfering with interstate commerce. A contract of marine insurance is not an instrumentality of commerce, but a mere incident of commercial intercourse. The State, having the power to impose conditions on the transaction of business by foreign insurance companies within its limits, has the equal right to prohibit the transaction of such business by agents of such companies, or by insurance brokers, who are to some extent the representatives of both parties. *Hooper* v. *California*, 155 U. S. 648; *Allgeyer* v. *Louisiana*, 165 U. S. 578.

The statute of Massachusetts of 1894, c. 522, on which this indictment is founded, besides requiring foreign insurance companies, as conditions precedent to doing business in the State, to appoint agents within the State, and to deposit a certain sum in trust for their policy-holders and creditors, provides, in section 3, that "it shall be unlawful" "for any person as insurance agent or insurance broker to make, negotiate, solicit or in any manner aid in the transaction of" insurance on or concerning any property, interest or lives in Massachusetts, except as authorized by the act; and, in section 98, that any person "who shall act in any manner in the negotiation or transaction of unlawful insurance" (evidently intending insurance declared unlawful by section 3) "with a foreign insurance company not admitted to do business in this Commonwealth," shall be punished by fine.

The acts of negotiation or transaction by the defendant in Massachusetts, admitted in the facts agreed by the parties, are that he solicited from McKie the business of procuring insurance upon his vessel in Boston, and, as agent of Johnson & Higgins of New York, having an office in Boston, secured the authority of McKie to the placing of a contract of insurance for a certain sum in pounds sterling upon the vessel, and transmitted an order for that insurance to Johnson & Higgins in New York; whereupon they, acting according to the usual course of business of the defendant, of themselves and of their agents in Liverpool, obtained from the London Lloyds, who had not been admitted to do business in Massachusetts, a

policy of insurance for that amount on the vessel; and the defendant afterwards, in Massachusetts, received from Johnson & Higgins that policy, and sent it by mail to McKie, which tends to show that the policy obtained from the foreign insurance company was the insurance which he had originally solicited. These facts clearly convict the defendant of negotiating and transacting in Massachusetts unlawful insurance with a foreign insurance company in violation of the statute, if that statute is constitutional.

In *Hooper* v. *California*, 155 U. S. 648, Hooper, the agent in California of the same Johnson & Higgins of New York, obtained from them a policy of marine insurance of a Massachusetts insurance company on a vessel in California owned by a citizen of California, to whom he delivered the policy in California. It was held that a statute of California, by which Hooper was guilty of procuring insurance for a resident of California from a foreign insurance company which had not given bond as required by the laws of California, was constitutional.

In *Allgeyer* v. *Louisiana*, 165 U. S. 578, the insurance was not obtained through an agent or broker, but by the assured himself; and the point decided was that a statute of a State punishing the owner of property for obtaining insurance thereon in another State was unconstitutional. In that case the decision in *Hooper's case* was expressly recognized and distinguished; and Mr. Justice Peckham, speaking for the court, and repeating the words of Mr. Justice White in *Hooper's case*, observed: "It is said that the right of a citizen to contract for insurance for himself is guaranteed by the Fourteenth Amendment, and that, therefore, he cannot be deprived by the State of the capacity to so contract through an agent. The Fourteenth Amendment, however, does not guarantee the citizen the right to make within his State, either directly or indirectly, a contract, the making whereof is constitutionally forbidden by the State. The proposition that, because a citizen might make such a contract for himself beyond the confines of his State, therefore he might authorize an agent to violate in his behalf the laws of his State, within her own limits, involves a clear *non sequitur*, and ignores the vital distinction between acts done within and acts done beyond a State's jurisdiction." 155 U. S. 658, 659; 165 U. S. 587, 588.

As was well said by the Supreme Judicial Court of Massachusetts, "While the legislature cannot impair the freedom of McKie to elect with whom he will contract, it can prevent the foreign insurers from sheltering themselves under his freedom in order to solicit contracts which otherwise he would not have thought of making. It may prohibit not only agents of the insurers, but also brokers, from soliciting or intermeddling in such insurance, and for the same reasons." 175 Mass. 156.

We are of opinion that the case at bar comes within *Hooper* v. *California*, and not within *Allgeyer* v. *Louisiana*; and that section 98 of the

statute of Massachusetts, under which the plaintiff in error has been convicted, is not contrary to the Constitution of the United States.

The effect of the other provision of the Massachusetts statute, declaring that "all contracts of insurance on property, lives or interests in this Commonwealth shall be deemed to be made therein," need not be considered; because the defendant has been convicted, not of the making of the contract, but of negotiating and transacting that contract in Massachusetts.

Judgment affirmed.

Mr. Justice HARLAN, dissenting:

In my opinion this case does not differ in principle from *Allgeyer* v. *Louisiana*, 165 U. S. 578; and so thinking I cannot concur in the opinion and judgment in this case.

True copy.

Test

Clerk Supreme Court, U. S.